TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 321.

SOUTH UTAH MINES & SMELTERS, PLAINTIFF IN ERROR,

vs.

BEAVER COUNTY.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF UTAH.

FILED APRIL 6, 1922.

(28,811)

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 22, 1922.

1 UNITED STATES OF AMERICA,
District of Utah, ss:

Pleas of the District Court of the United States for the Central Division of the District of Utah at a stated term appointed by law, begun and holden in the Federal building, at Salt Lake City, on the second Monday, being the 14th day, of November, in the year of our Lord nineteen hundred and twenty-one, and the one hundred and forty-sixth year of the Independence of the United States of America.

Present: Honorable Page Morris, United States District Judge for the District of Minnesota, duly designated to aid and assist in the District of Utah.

TRANSCRIPT OF THE RECORD.

At Law.

No. 6282.

SOUTH UTAH MINES & SMELTERS, a Corporation, Plaintiff,

vs.

BEAVER COUNTY, a Municipal Corporation, Defendant.

Complaint

filed in said Court on the 26th day of March, 1921, which being entitled in this Court and cause, is as follows, to-wit:

Plaintiff for its cause of action alleges:

2 I. Plaintiff, South Utah Mines & Smelters, is now and at all times hereinafter mentioned was a corporation organized and existing under and by virtue of the laws of the State of Maine, is now and at all said times was a citizen of and resident in said State of Maine, and no other state.

II. Defendant, Beaver County, is now and at all of the times hereinafter mentioned was a municipal corporation organized and existing under and by virtue of the laws of the State of Utah, and is now and at all of such times was a citizen of and resident within said State of Utah.

III. The controversy herein is one wholly between citizens of different states and the matter or amount in dispute exceeds the sum of $3,000.00, exclusive of interest and costs.

IV. Plaintiff is and since its organization always has been a mining corporation; now owns and at all times since the 21st day

of October, 1909, has owned mining property at and in the vicinity of Newhouse, Beaver County, Utah; that said property consists among other things of certain mining claims, located in San Francisco Mining District, a concentrating mill or reduction plant that is now obsolete and largely dismantled, dwelling houses, water, pipe line, and other mining facilities that now constitute what remains of a one time plant of elaborate proportions. That plaintiff purchased and acquired said property on or about the 21st day of October, 1909, and thereafter continuously operated the same until the 4th day of August, 1914. That plaintiff in the conduct of its said mining operations extracted copper bearing ores from its said mining claims, transported said ores approximately three (3) miles to its concentrating mill, crushed and concentrated said ores and shipped and sold the resulting concentrates to the smelters in
3 the Salt Lake valley in the State of Utah. That in the course of the concentration of said ores refuse mater-al containing copper and other material in quantities too small to be capable of profitable treatment by then known processes was deposited in the vicinity of said concentrating mill in a dump as tailings. That prior to plaintiff's acquisition of said property plaintiff's predecessor in interest had similarly operated the same continuously from the 21st day of May, 1903, and in the course of such operations had deposited similar refuse material or tailings upon said dump. That in the course of said operations by plaintiff and its predecessor covering the total period from May 21, 1903 to August 4, 1914, approximately 900,000 tons of such tailings had accumulated in a tailings deposit or dump upon desert land owned by plaintiff, non-mineral in character and located at and about its said concentrating mill and some two or three miles away from plaintiff's mine and mining claims.

V. That on the 4th day of August, 1914, plaintiff closed down its said mine and ceased to operate the same, and said mine has not since been operated by plaintiff or anyone else, for the reason that no ore bodies of commercial size remain therein to be extracted, and for the further reason that careful and extended exploration has disclosed beyond reasonable doubt that all known ore deposits in said mine have been exhausted, and there are no other deposits of commercial proportions to be found therein, and that said mine is now and ever since the 4th day of August, 1914, has been without either present or prospective value. That ever since said 4th day of August, 1914, plaintiff has been gradually dismantling its said mining property and disposing of all property removable
3½ therefrom for which a market could be found, until said mine on the 1st day of January, 1919, and long prior and subsequent thereto was wholly without value as a mine, incapable of operation as such, and in all respects an abandoned, worked out, worthless property.

VI. That on or about the 13th of January, 1914, plaintiff entered into a certain agrement in writing bearing said date, whereby plain-

tiff sold and delivered to Utah Leasing Company, a corporation, plaintiff's said tailings deposit hereinabove referred to, resulting from the mining operations of plaintiff and its predecessor as hereinbefore alleged. That a copy of said agreement is hereto attached and marked for identification "Plaintiff's Exhibit A"; that pursuant to said agreement, Utah Leasing Company took possession of said tailings deposit, constructed adequate reduction works and therein treated said deposit and removed therefrom in a commercial manner its contents of copper, gold and silver and paid over to the plaintiff ten (10) per cent of such recovery as by said agreement provided.

VII. Plaintiff is informed and believes that the State Board of Equalization of the State of Utah in its assessment of plaintiff's said mine for the year 1919 attempted to adapt the provisions of Section 5864, Compiled Laws of Utah, 1917, as amended and appearing as Section 5864 in Chapter 114, Laws of Utah, 1919, and therein applied the definitions and provisions of said section to the operations of said Utah Leasing Company, and found that the so-called "net annual proceeds" of said Utah Leasing Company derived from the latter's treatment of said tailings dump or deposit, had amounted to the sum of $120,547.00 for the year 1918; that said State Board of Equalization thereupon applied to said sum of $120,547.00 the multiple of three prescribed by said Section 5864 as amended,
4 and arrived at the sum of $361,641.00, which last named sum said State Board of Equalization, over plaintiff's protest, found to be the value of plaintiff's said mine for the purpose of assessment for the year 1919. That on or about the 29th day of November, 1919, defendant, Beaver County, by its duly qualified Treasurer and Tax Collector did collect from this plaintiff the sum of $6,907.34 as and for a tax levied and assessed against plaintiff's said mine for the year 1919 upon said valuation of $361,641.00 made by said Board of Equalization as hereinbefore alleged.

VIII. That said assessment and levy and collection of said tax on said sum as the value of plaintiff's mine for the year 1919 was unreasonable, arbitrary, illegal and without authority of law in this: That said assessment by said State Board is not and does not pretend to be even remotely indicative of the actual or market value of said mine. That said assessment was made with an arbitrary and unlawful disregard of the actual or market value of said mine; that the provisions of neither Section 5864, Complied Laws of Utah, 1917, as amended, nor any other statute or statutes or law were intended to, nor do they authorize the application of such or any multiple or such or like assessment or levy of or upon plaintiff's mine, and neither defendant nor its Treasurer and Tax Collector, nor any other person whomsoever had any authority whatever to make said levy; that said assessment and levy was in violation of Section 3 of Article XIII of the Constitution of Utah, insuring a uniform and equal rate of assessment and taxation on all property in the State, according to its value in money and requiring the adoption by the Legislature of such laws as shall secure a

just valuation for taxation of all property so that every
5 person and corporation shall pay a tax in proportion to the value of his, her or its property; that said assessment and levy was in violation of Section 4 of Article XIII of the Constitution of Utah; and said assessment and levy was in violation of that part of Section 1 of the 14th Amendment to the Constitution of the United States wherein it is provided that no state shall deny to any person within its jurisdiction the equal protection of the laws.

IX. That this plaintiff further alleges that at the time aforesaid, to-wit, the 29th day of November, 1919, when said defendant by and through its said Treasurer and Tax Collector exacted payment by this plaintiff of the sum of $6,907.34 aforesaid, this plaintiff did pay said tax to said Treasurer and Tax Collector under protest.

X. That plaintiff has demanded of said defendant the payment of said sum of $6,907.34 so illegally collected as aforesaid, but this defendant has refused and still refuses to pay said sum or any part thereof.

XI. That in addition to said assessment upon plaintiff's mine herein alleged said State Board found the value of improvements and personal property and land other than mining claims for the year 1919 to be $65,216.00; that said State Board assessed plaintiff's mining claims at $5.00 per acre, creating an assessment thereupon of $975.00, and creating also for the year 1919 the total assessed value of all plaintiff's property, in addition to said unlawful assessment upon plaintiff's mine aforesaid, of $66,191.00. Upon said assessed value of $66,191.00 defendant levied upon and collected from plaintiff a tax amounting to $1,741.75, which plaintiff paid upon the 29th day of November, 1919.

Wherefore, plaintiff prays judgment against said defendant for the sum of $6,907.34, together with interest thereon at the rate of
eight (8) per cent per annum from the 29th day of Novem-
6 ber, 1919, and for its costs of suit in this behalf incurred.

(Signed) C. C. PARSONS &
FISHER HARRIS,
Attorney- for Plaintiff.

P. O. Address: 515 Kearns Building, Salt Lake City, Utah.

STATE OF KANSAS,
County of Miami, ss:

W. Lee Heidenreich, being first duly sworn upon oath, deposes and says: That he — an officer or agent of the plaintiff above named, South Utah Mines & Smelters, to-wit, the Manager thereof, that he has read the above and foregoing complaint, knows the contents thereof, and that the same is true to the best of his knowledge, except as to matter therein stated upon information and belief, and as to such he believes it to be true.

(Signed) W. LEE HEIDENREICH.

Subscribed and sworn to before me this 10th day of December, 1920. My commission expires February 27, 1921.

[SEAL] (Signed) C. J. MATTHEWS,
Notary Public.

PLAINTIFF'S EXHIBIT "A."

This agreement, made and entered into this 13th day of January, 1914, by and between the South Utah Mines and Smelters, a corporation organized and existing under the laws of the state of Maine, hereinafter called the "Mining Company," party of the first part, and the Utah Leasing Company, a corporation organized and existing under the laws of the state of Utah, hereinafter called the "Leasing Company," party of the second part;

Witnesseth: That for and in consideration of the mutual covenants and agreements hereinafter set forth, the parties hereto do hereby agree to and with each other as follows, to-wit:

First: The Mining Company agrees to lease to the Leasing Company a plot of ground sufficient for their needs upon that certain land belonging to the Mining Company situated North of the South edge of the Mining Company's present tailings dump at or near the town of Newhouse, Beaver County, Utah, for the purpose of the erection of a certain plant, buildings and machinery, and the maintenance and operation of the same, in the treatment of said tailings dump of the Mining Company; said lease to begin upon the execution by both parties hereto of this agreement, and to extend for a period of five (5) years from said date, with privilege to the Leasing Company of renewal for five (5) years additional if the Leasing Company shall upon its part keep and perform all the conditions and covenants of this agreement by it to be kept and performed.

Second. The Mining Company agrees to furnish to the Leasing Company, free of cost, fresh water sufficient for its needs, but not to exceed at any time a rate of sixty (60) gallons per minute, except as hereinafter provided. The water to be piped from the pipe lines of the Mining Company's mill at the expense of the Leasing Company. If, however, the operations of the Mining Company shall be at any time while this agreement is in force, suspended in its mine and mill the necessary repairs and running expenses in the keeping up of all repairs on the pipe line across the valley, to the aforesaid plant of the Leasing Company, shall be borne by said last named company. The Mining Company agrees to furnish water in addition to the sixty gallons up to a total of two hundred (200) gallons per minute, to said Leasing Company, if in the opinion of the Mining Company this can be done without affecting its operations. The Mining Company also agrees to allow, during its milling operations, the Leasing Company to recover from the tail race and slimes leaving the Mining Company's mill such amount of water as it, the Leasing Company, is able to recover without affecting the operations of the Mining Company.

Third. The Mining Company further agrees to furnish said Leasing Company, subject to the approval of the Beaver River Power Company, a sufficient electrical energy to operate its plant. Said energy to be approximately four hundred and forty (440) volts and sixty (60) cycle, the quality and character of which, however, is not guaranteed by the Mining Company, and is not to exceed two hundred (200) horse power; said energy to be measured by indicating watt meters similar to the instruments measuring the energy used in the Mining Company's operations; the instruments to be placed in the Mining Company's power house and to be calibrated so as to allow for copper and iron losses in transforming the energy from 44,000 to 440 volts. It is further agreed that the entire expense of additional electrical installation for the use and benefit of the Leasing Company is to be borne by said Leasing Company.

Fourth. It is further agreed that the Leasing Company shall hold the Mining Company free from any liability or responsibility for damage or injuries to persons or property arising at the place of installation of the measuring instruments measuring the Leasing Company's power, and at all places beyond said installation.

Fifth. It is further agreed that the power or electrical energy used by said Leasing Company in its operations shall be paid for by said company to the Mining Company promptly on the 15th day of the month next succeeding its use by said Leasing Company on terms similar to those enjoyed by the Mining Company.

Sixth. If at any time during the existence of this lease the Mining Company should cease to use electrical energy it will allow the Leasing Company the free use of its transformers to reduce the potential from 4,400 to 440 volts, and payments for electrical energy used by the Leasing Company shall be made in that event
8 direct to the Beaver River Power Company, and in that case all repairs and the cost of the upkeep of electrical equipment used by the Leasing Company shall be paid for by it.

Seventh. It is further agreed that in case the energy delivered at the Mining Company's power house by the Beaver River Power Company should at times become insufficient for the various operations of the Mining Company said company reserves the right to distribute the power according to its best judgment.

Eighth. The Leasing Company agrees to begin the construction of its plant within three (3) months after the execution of this agreement, and within nine (9) months therefrom to have said plant in operation at a capacity of, and treat not less than three thousand (3,000) dry tons per month, the average at all times to be computed from the tonnage handled or treated by it during each and every period of three (3) consecutive months. Said Leasing Company also agrees to treat six thousand (6,000) dry tons per month of said tailings dump within fifteen (15) months and twelve thousand (12,000) dry tons per month within twenty-one (21) months after the execution of this agreement, barring unavoidable

accidents, delays or strikes. The said Leasing Company further agrees to operate its plant continuously, save and except when it shall be unavoidably delayed by accidents or other causes beyond its power or control. If, however, said Leasing Company shall fail within nine months from the date of execution of this contract to have its plant in operation at a capacity of three thousand dry tons per month or more, or of 6,000 dry tons per month or more within fifteen months, or of 12,000 dry tons per month or more within twenty-one months after the execution of this agreement, such failure or default shall not be construed as a breach of this contract provided the Leasing Company shall pay to the Mining Company a royalty of Two Hundred Fifty ($250.00) Dollars per month
8½ for six months after the first nine months from the execution of this contract, and Five Hundred ($500.00) Dollars per month for the following six months, and One Thousand ($1,000.00) Dollars per month thereafter. Said payments of royalty to be made in cash on or before the 15th day of the month following the month for which royalty is to be paid under this agreement.

Ninth. The said Leasing Company agrees to treat the said tailings dump of said Mining Company, together with the tailings finally discharged from, said Mining Company's mill at its own expense by a leaching process or some other process suitable for the purpose of extracting the copper contained therein, and agrees that the copper produced from the Mining Company's tailings dump shall for each and every period of three consecutive months be not less than sixty per cent of the total copper contained in the tailings handled or treated by the Leasing Company during the said three months' periods.

Tenth. The Leasing Company agrees to ship all its bullion, copper, concentrates and other products that may be produced under this agreement from the tailings dump of the Mining Company to some smelter in Salt Lake Valley, or to some other smelter or refinery as the parties hereto may mutually agree upon, which said smelter or refinery as the case may be shall deliver the refined copper to the order of the Leasing Company in New York City to be sold for the Leasing Company by the present selling agent of the Mining Company, provided the Leasing Company shall make an agreement for the smelting or refining of such concentrates or other products with the smelter or refinery which shall be approved by the Mining Company, and shall pay said selling agent at the same rate the Mining Company pays the said agent, namely: A commission of one per cent on the price received from all copper sold by him for the Leasing Company.

9 Eleventh. It is further agreed that ten (10) per cent of the copper, gold and silver in the bullion or other products produced by the Leasing Company under this agreement shall be paid to the Mining Company as royalty without cost to it f. o. b. cars at Newhouse, Utah, and the Mining Company shall pay all additional charges for freight and refining on said ten per cent of the said bullion or other products. This royalty shall be paid to the Min-

ing Company by the Leasing Company whether or not its plant is operating at capacity stipulated in this contract, but the Leasing Company agrees that the net royalty accruing and to be paid to the Mining Company shall at no time during the six months after the first nine months from the execution of this agreement, be less than Two Hundred and Fifty ($250.00) Dollars per month, nor less than Five Hundred ($500.) Dollars per month for the following six months, nor less than One Thousand ($1,000.) Dollars per month thereafter, and if royalty paid to the Mining Company in copper bullion, concentrates, or other products, shall be less than above stated, the difference shall immediately become due and payable and shall be paid by the Leasing Company in cash to the Mining Company within fifteen days after written notice to it from the Mining Company.

It is further mutually agreed that if the price of electrolytic copper in New York shall decline to below 13 cents per pound, the Leasing Company shall be permitted to suspend operations during said low price of copper and that during such suspension of operations no royalties shall be charged against the Leasing Company. This time of suspension of operation shall be added to the Leasing Company's plant — shall be closed down on account of term of this lease; or if said strikes or unavoidable accidents beyond its power or control to remedy, the Leasing Company shall not be charged with royalty for this period, and the time of this suspension of operations shall also be added to the term of this lease.

Twelfth. It is further stipulated that the Leasing Company shall protect and keep harmless the Mining Company from any and all claims for damages, cost or expense caused by sulphur fumes arising from the operations of said Leasing Company and shall also protect and keep harmless said Mining Company from all injuries, damages and claims caused by acid waters and if necessary to construct and maintain a good and substantial fence to prevent cattle, sheep or other live stock from access to said acid waters.

Thirteenth. That nothing in this contract shall be construed to require the Leasing Company to construct any plants, buildings, or machinery on the property of said Mining Company, or at all; but this contract on the contrary shall be construed as granting to the Leasing Company the option to construct the plants, buildings or machinery as in said contract mentioned; nor shall anything in this contract be construed as giving the Mining Company a right to recover any damages from the Leasing Company if it shall fail to construct such plants, buildings or machinery as provided for in this contract. Such failure, however, shall at the election of the Mining Company and upon ten days notice, in writing by it to the Leasing Company operate as a termination of this agreement and thereafter the same shall be void and of no effect.

Fourteenth. It is mutually understood and agreed by and between the parties hereto that all plants, buildings, machinery, or other improvements placed upon any of the real estate belonging to the

Mining Company by the Leasing Company shall remain as personal property and said company shall have the right upon the termination of this contract by limitation or otherwise to remove any of such plants, buildings, machinery or other improvements so placed upon said property at any time within ninety days after the
11 termination of this contract.

Fifteenth. It is further agreed that upon violation of any of the terms and conditions of this contract by either of the parties hereto the said agreement may be terminated at the option of the other upon ten days' notice, in writing, and thereafter shall be and become null and void.

In witness whereof the parties hereto have caused these presents to be signed by their duly authorized officers and their respective corporate seals to be hereunto affixed, and attested by their respective Secretaries the day and year first hereinabove written.

SOUTH UTAH MINES & SMELTERS,
By HUGO HOFFSTADTER,
President.

Attest:
H. G. ROBINSON,
Secretary.

UTAH LEASING COMPANY,
By J. C. DICK,
President.

Attest:
A. THOMAS,
Secretary.

Filed March 26, 1921.
(Signed) JOHN W. CHRISTY,
Clerk.

Answer,

filed in said Court on the 9th day of May, 1921, which being entitled in this Court and cause, is as follows, to wit:

Now comes the above named defendant and for answer to plaintiff's complaint admits, denies and alleges as follows, to wit:

I. Defendant admits the allegations contained in paragraphs I, II, III and IV.

II. Answering paragraph V defendant admits that on the 4th day of August, 1914, plaintiff closed down its said mine and ceased to operate the same and that said mine has not since been operated by plaintiff or anyone else. Defendant has no knowledge or
12 information sufficient to enable it to form a belief as to the truth of the allegation that all known ore deposits of commercial size in said mine have been exhausted, and basing its denial

on that ground, denies the same. Defendant admits and alleges that there are ore deposits in said mine of present value, which may by development and treatment processes become of commercial value. Defendant denies that ever since the 4th day of August, 1914 said mine has been without present or prospective value, but alleges that the tailings dump referred to by plaintiff in its said complaint, was at all times mentioned by said plaintiff for purposes of taxation, a part of said mine, and contained valuable ores or metals, as disclosed by the statement furnished by the plaintiff to the State Board of Equalization and Assessment of the State of Utah on or before the 2nd Monday in February, 1919, showing the net annual proceeds from said mine for the year 1918. Defendant admits that ever since the 4th day of August, 1914, plaintiff has been gradually dismantling its said mining property and disposing of all property removable therefrom, for which a market could be found, but denies that on the 1st day of January, 1919 and long prior and subsequent thereto the said mine was wholly without value as a mine, incapable of operation as such and in all respects an abandoned, worked-out, worthless property.

III. Answering paragraph VI defendant denies that the plaintiff sold and delivered to the Utah Leasing Company, a corporation, its said tailings deposit by that certain agreement between plaintiff and the said Utah Leasing Company, dated January 13, 1914 and referred to as "Plaintiff's Exhibit A," but alleges that said agreement in effect was a lease of a certain plot of ground on which the
13 Utah Leasing Company could erect a plant and certain buildings and machinery for the treatment of the said tailings dump, and a contract by the said Utah Leasing Company for the treatment of said tailings dump and a division of the profits derived therefrom.

IV. Answering paragraph VII defendant admits that the State Board of Equalization and Assessment of the State of Utah in its assessment of plaintiff's mine for the year 1919 did adapt the provisions of section 5864, Compiled Laws of Utah, 1917, as amended, and appearing as section 5864 in Chapter 114 of the Laws of Utah, 1919, and it applied the definitions and provisions of said section to the proceeds derived from said mine of plaintiff, including said tailings dump and operations of the Utah Leasing Company, and found, from the statement furnished by the plaintiff, after making all the deductions claimed by the plaintiff for estimated cost of extraction, of installation, construction and maintenance of machinery and all other deductions permitted by said section 5864, Compiled Laws of Utah 1917, as amended and appearing in Chapter 114 of the Laws of 1919, that the "net annual proceeds" of said mine amounted to the sum of $120,547.00 for the year 1918. Defendant admits that the said State Board of Equalization thereupon applied to the said sum of $120,547.00, the multiple of three, prescribed by said section 5864 as amended, and arrived at the sum of $361,641.00, which last named sum said Board of Equalization and Assessment found to be the value of plaintiff's said mine for the purpose

of assessment for the year 1919. Defendant admits that on or about the 29th day of November 1919, Beaver County, by its duly qualified Treasurer and Tax Collector, did collect from the plaintiff
14 the sum of $6,907.34 as and for the tax levied and assessed against plaintiff's said mine for the year 1919 upon said valuation of $361,641.00 made by said Board of Equalization and Assessment hereinbefore alleged; defendant denies each and every other allegation in said paragraph contained.

V. Defendant denies each and every allegation contained in paragraph numbered VIII.

VI. Defendant admits the allegations contained in paragraph IX.

VII. Answering paragraph X, defendant admits that the plaintiff has demanded of the defendant the repayment of the said sum of $6,907.34 and that the defendant has refused and still refuses to pay said sum, or any part thereof, but denies that the said sum was illegally collected.

VIII. Answering paragraph XI defendant admits that in addition to said assessment of $6,907.34 the said Board of Equalization and Assessment found the value of improvements and personal property and land, other than mining claims, for the year 1919, to be $65,216.00; admits that the said State Board of Equalization and Assessment and defendant assessed plaintiff's mining claims at $5.00 per acre, creating an assessment thereupon of $975.00 and creating also for the year 1919 the total assessed value of all plaintiff's property, in addition to the assessment of the net annual proceeds aforesaid, of $66,191.00; admits that upon said assessed value of $66,191.00 defendant levied upon and collected from the plaintiff a tax amounting to $1,741.75, which said plaintiff paid upon the
15 29th day of November, 1919. But defendant denies that the said tax of $6,907.34 of the net annual proceeds of said mine was unlawful.

IX. Defendant denies each and every allegation in said complaint contained, not hereinabove specifically admitted, denied or qualified.

Wherefore, having fully answered, defendant prays that plaintiff take nothing by reason of its complaint herein and that defendant may be dismissed hence with its costs herein expended.

(Signed) HARVEY H. CLUFF,
Attorney General;
WM. A. HILTON,
J. ROBERT ROBINSON,
W. HAL FARR,
LAWRENCE A. MINER,
Assistant Attorneys General,
Attorneys for Defendant.

STATE OF UTAH,
County of Juab, ss:

Wm. Bailey being first duly sworn deposes and says that he has read the foregoing Answer and knows the contents thereof and that the same is true of his own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters he believes it to be true; that he was during the year 1919, and for several years prior thereto, Secretary of the State Board of Equalization and Assessment of the State of Utah, and that he is familiar with all the facts and circumstances detailed in the said Answer; that the assessments referred to in said Answer were made by the State Board of Equalization and Assessment and defend-
16 ant by reason of which this affiant makes this verification on behalf of the defendant.

(Signed) WM. BAILEY.

Subscribed and sworn to before me this 4th day of May, 1921.
[SEAL.] (Signed) THOS. H. BURTON,
Notary Public, Residing at Nephi.

My commission expires Aug. 27, 1921.

Due service and receipt of copy of the foregoing Answer is hereby acknowledged this 9th day of May, 1921.
(Signed) C. C. PARSONS AND
FISHER HARRIS,
Attorneys for Plaintiff.

Filed May 9, 1921.
(Signed) JOHN W. CHRISTY,
Clerk.

Stipulation Waiving Jury,

filed in said Court on the 2nd day of September, 1921, which being entitled in this Court and cause, is as follows, viz:

A jury is hereby waived in the above entitled action. Dated at Salt Lake City, Utah, September 2nd, 1921.
(Signed) C. C. PARSONS,
FISHER HARRIS,
Attorneys for Plaintiff.
(Signed) HARVEY H. CLUFF,
Attorney General;
WM. A. HILTON,
Asst. Atty. General,
Attorneys for Defendant.

Filed Sept. 2, 1921.
(Signed) JOHN W. CHRISTY,
Clerk.

Order Setting Cause for Trial,

made and entered on the 3rd day of September, 1921, which being entitled in this court and cause, is as follows, viz:

At this day, on motion of plaintiff, by C. C. Parsons, its attorney, it is ordered that this cause be set for trial October 4, 1921.

17 *Minute Book Entry, Trial Begun,*

made and entered on the 14th day of October, 1921, which being entitled in this Court and cause, is as follows, viz:

At this 14th day of October, 1921, comes said plaintiff, by C. C. Parsons and Fisher Harris, its attorneys, and the defendant, by Harvey H. Cluff and W. A. Hilton, its attorneys, also come. And this cause coming on now regularly for trial by the Court, a trial by jury having been waived by written stipulation filed herein, said plaintiff to maintain the issue on its part, called James C. Dick, S. F. Van Winkle, W. Lee Heidenreich, and William Bailey as witnesses, who were duly sworn and examined, and introduced certain documentary evidence. And thereupon plaintiff rested its case. Whereupon defendant moved that this cause be dismissed because a sufficient cause has not been made by plaintiff to justify granting the relief prayed. And to maintain the issues on its part, defendant called E. E. Meyer as a wirness, who was duly sworn and examined. And thereupon defendant rested its case. And the Court having heard the evidence and the arguments of counsel, the same is by the Court taken under advisement, with leave to counsel for defendant to prepare, serve and present his brief, and ten days thereafter to counsel for plaintiff to prepare, serve and present his brief in reply thereto.

Minute Book Entry of Decision,

made and entered on the 15th day of November, 1921, which being entitled in this court and cause, is as follows, viz:

At this day, comes plaintiff, by C. C. Parsons, its attorney and the defendant, by W. A. Hilton, Assistant Attorney General. And this cause having been submitted upon the evidence and arguments of counsel, and taken under advisement, now after due con-
18 sideration the Court finds for the defendant, with direction to counsel for defendant to prepare and submit a judgment herein.

Judgment,

entered in Minute Book, in the Judgment Book, and a part of the Judgment Roll on the 17th day of November, 1921, which being entitled in this court and cause is as follows, viz:

This cause came on regularly for hearing on the fourteenth day of October, 1921, Charles C. Parsons, Esq., appearing as counsel for the plaintiff, and Harvey H. Cluff, Attorney General of Utah and William A. Hilton, Assistant Attorney General of Utah, for the defendant. A trial by jury having been expressly waived by counsel for the respective parties, the case was tried before the court sitting without a jury, whereupon witnesses were examined on the part of the plaintiff and defendant, and the evidence being closed, the case was submitted for consideration and decision; and after due deliberation thereon, the court delivered its findings and decision orally in open court on the fifteenth day of November, 1921, and ordered that judgment be entered in accordance therewith.

Wherefore, by reason of the law and the findings aforesaid, it is ordered and adjudged that the plaintiff, the South Utah Mines and Smelters, a corporation, recover nothing, and that judgment be entered in favor of the defendant, Beaver County, a municipal corporation, and

It is, further, ordered and adjudged that the defendant do have and recover of the said plaintiff its costs and disbursements incurred in said action, and other fees allowed by law.

Dated at Salt Lake City, Utah, this 17th day of November, 1921.

(Signed) PAGE MORRIS,
Judge.

Filed Novbr. 17, 1921.
(Signed) JOHN W. CHRISTY,
Clerk.

19 *Motion to Correct Record and for Findings of fact and Conclusions of Law*

filed in said Court on the 30th day of December, 1921, which being entitled in this Court and cause, is as follows, viz:

Comes now plaintiff above named and respectfully represents to the court that the above entitled cause was one at law tried to the court without a jury; that the evidence offered and received therein was undisputed and presents no controverted question of fact; that judgment was entered therein by this court on the 17th day of November, 1921, but that no findings of fact nor conclusions of law have been made or filed herein; and the record in said cause is defective in said respect.

Wherefore plaintiff moved the court for an order correcting the record in said particular by making and filing in said cause as of the 17th day of November, 1921, the findings of fact and conclusions of law submitted herewith, or such other findings and conclusions as to the court may seem proper conformable to the court's decision in said action.

This motion is made upon the record, files, testimony and decision of the court in said cause.

(Signed) C. C. PARSONS,
FISHER HARRIS,
Attorneys for Plaintiff.

Filed Decr. 30, 1921.
(Signed) JOHN W. CHRISTY,
Clerk.

Minute Book Entry as to Findings of Fact and Conclusions of Law

made and entered in said Court on the 13th day of February, 1922, which being entitled in this court and cause, is as follows, to-wit:

At this 13th day of February, 1922, on Motion of defendant, by C. C. Parsons, its attorney, it is ordered that the findings of fact and conclusions of law and memo. duly signed and this day
20 received from the Honorable Page Morris, designated to aid and assist in this district be filed this day nunc pro tunc as of the 17th day of November, 1921, and that same be entered in the judgment book of this Court.

Findings of Fact and Conclusions of Law.

filed in said Court on the 13th day of February, 1922, nunc pro tunc as of November 17, 1921, which being entitled in this Court and cause are in words and figures following, to-wit:

This cause coming on for trial on the 14th day of October, 1921, and having been tried before the Court, a jury having been waived, C. C. Parsons and Fisher Harris appearing for the plaintiff, and Harvey H. Cluff, Attorney General of the State of Utah and Wm. A. Hilton, Assistant Attorney General, for the defendant; and after hearing the allegations and proofs of the parties, the arguments of counsel and being advised in the premises, I hereby make and file the following findings of fact and conclusions of law, constituting my decision in said action:

Findings of Fact.

1. That plaintiff, South Utah Mines and Smelters, is now and was at all times hereinafter mentioned a corporation organized and existing under the laws of the State of Maine, and is now and at all said times was a citizen of and resident in said State of Maine, and no other state.

2. That defendant, Beaver County, is now and at all of the times hereinafter mentioned was a municipal corporation organized and existing under the laws of the State of Utah, and is now and at all of said times was a citizen of and resident within said State of Utah.

3. The controversy herein is one wholly between citizens of different states and the matter or amount in dispute exceeds the sum of $3,000.00, exclusive of interest and costs.

21 4. Plaintiff is and since its organization always has been a mining corporation; now owns and at all times since the 21st day of October, 1909, has owned mining property at and in the

vicinity of Newhouse, Beaver County, Utah; that said property consists among other things of certain mining claims containing 195 acres with 20 to 25 miles of underground workings (trans. pp. 46 and 49) located in San Francisco Mining District, a concentrating mill or reduction plant that is now obsolete and largely dismantled, dwelling houses, water, pipe line, and other mining facilities that now constitute what remains of a one time plant of elaborate proportions. That plaintiff purchased and acquired said property on or about the 21st day of October, 1909, and thereafter continuously operated the same until the 4th day of August, 1914. That plaintiff in the conduct of its said mining operations extracted copper bearing ores from its said mining claims, transported said ores approximately three (3) miles to its concentrating mill, crushed and concentrated said ores and shipped and sold the resulting concentrates to the smelters in the Salt Lake valley in the State of Utah. That in the course of the concentration of said ores, refuse material containing copper and other material in quantities too small to be capable of profitable treatment by the then known processes, was deposited in the vicinity of said concentrating mill in a dump as tailings. That prior to plaintiff's acquisistion of said property, plaintiff's predecessor in intereste had similarly operated the same continuously from the 21st day of May, 1903, and in the course of such operations had deposited similar refuse material or tailings upon said dump. That in the course of said operations by plaintiff and its predecessor covering the total period from May 21, 1903, to August 4, 1914, approximately 900,000 tons of such tailings had accumulated in a tailings deposit or dump upon desert land owned by plaintiff, non-mineral in character and located at and about its said concentrating mill and some two or three miles away from plaintiff's mine and mining claims.

22 5. That on the 4th day of August, 1914, plaintiff closed down and ceased to operate its said mine, and the same as distinguished from the tailings deposit or dump has not since been operated by plaintiff or anyone else. That on said 4th day of August, 1914, all the ores or metalliferous deposits in said mine which could be profitably mined therefrom under processes then known had been taken from said mine and at no time since said date could any of the ores or metalliferous deposits left in said mine have been profitably mined therefrom under known processes, and said mine, as distinguished from said tailings deposit or dump, has since said date been of no value; but that at no time either before or since said date has the said plaintiff abandoned its said mine, mining claims and mining property, but on the contrary during all of the said period has maintained its title thereto and paid and discharged all taxes levied and assessed against the same, including all taxes levied and assessed against said property during the year 1919, exclusive of the said taxes in controversy herein and paid under protest as hereinafter found. That on January 1, 1919, said tailings deposit or dump, if and as distinguished from said mine, was of the value of $20,000.

6. That on the 13th day of January, 1914, plaintiff entered into an agreement with the Utah Leasing Company, admitted in evidence and identified as Exhibit No. 1, and also attached to the complaint as Plaintiff's Exhibit "A," which agreement contemplated the treatment and reduction of plaintiff's said tailings deposit or dump. In pursuance of that agreement said Utah Leasing Company took possession of said tailings deposit or dump, constructed reduction works, using and utilizing in connection therewith such of plaintiff's improvements upon said mining properties and connected therewith as were necessary or proper for the purpose of reducing in a commercial manner the contents of said tailings deposit or dump, and treated said tailings deposit or dump, removing therefrom in a commercial manner its contents of copper, gold and silver, and paid over to the plaintiff ten (10) per cent of such recovery as by said agreement provided. That in the year 1918, the net earnings resulting from the treatment of said tailings deposit or dump amounted to the sum of $120,547.00; that in and by the provisions of the constitution and laws of the State of Utah, it was at said time and is now provided that in arriving at the value of mines and mining claims the net annual proceeds derived from the working and operation thereof shall be used as a basis, and that the value of such mines and mining property for taxation purposes shall be determined by multiplying the net annual proceeds derived from the mining operations carried on during the preceding year by three; that the taxing authorities of the State of Utah applied the multiple of three as provided by said laws to the said sum of $120,547 and arrived at the sum of $361,641, which last named sum said taxing authorities, over plaintiff's protest, found to be the value of plaintiff's said mining property for the purpose of assessment for the year 1919, and on or about the 29th day of November, 1919, defendant Beaver County, by its treasurer and tax collector, did collect from plaintiff the sum of $6,907.34 as and for a tax levied and assessed against plaintiff's said mining property for the year 1919, upon said valuation of $361,641 made by said taxing authorities as aforesaid.

23

7. That plaintiff paid said taxes of $6,907.34 to defendant on the 29th day of November, 1919, under protest.

8. That plaintiff has demanded of defendant the payment of said sum of $6,907.34, collected as aforesaid, but defendant refuses to pay said sum or any part thereof.

9. That in addition to said assessment upon plaintiff's mine, said taxing authorities levied and collected from plaintiff a further tax amounting to $1,741.75 upon the value of improvements and personal property and land other than mining claims for said year 1919, upon the assessed value thereof of $65,216 and upon acreage of mining claims (195 acres) at the assessed value of $975.

24

10. That plaintiff at no time has paid any taxes upon its said mine or mining claims, except the taxes based upon the net proceeds of ores and minerals mined, extracted or removed from its said mine, other than the tax based upon the valuation of $5.00 per acre, the purchase price paid the United States Government for said mining claims, pursuant to the constitution and laws of the state of Utah, and that at no time whatever has the said plaintiff ever paid any taxes upon any tailings or tailings dump or the ores or minerals therein contained, nor has any assessment been made thereon.

Conclusions of Law.

Upon the foregoing findings of fact the Court decides, as its conclusions of law:

1. That the Court has jurisdiction of the parties to this suit and of the subject matter thereof.

2. The provisions of Section 4, of Article XIII of the Constitution of Utah and the statute subsequently passed in pursuance thereof are constitutional and not in contravention of the Constitution of the United States.

3. The contract between the plaintiff and the Utah Leasing Company, Exhibit No. 1, pursuant to which the tailings dump here in question was worked, did not constitute a sale of that dump, but was merely a contract for recovering the metal contained therein.

4. That said tailings deposit or dump was a part of plaintiff's mine and continued to be such until its metal content had been removed and as such was assessable for purposes of taxation at a value represented by three times the net proceeds thereof according to the method pursued by the taxing officers, and that such was the only method whereby this particular dump could be taxed.

5. The rule adopted by Section 4 of Article XIII of the Constitution of Utah and the statute passed in pursuance thereof, furnish a reasonable basis of classification.

6. That the defendant is entitled to a judgment dismissing the complaint of plaintiff, and

7. That the defendant is entitled to its costs herein incurred or expended.

Let judgment be entered accordingly.
Dated and filed as of the 17th day of November, 1921.
By the Court.
(Signed) PAGE MORRIS,
Judge.

Filed February 13, 1922, nunc pro tunc as of November 17, 1921.
(Signed) JOHN W. CHRISTY, *Clerk.*

Memo.

On Tuesday, November 15, 1921, the Court, announcing its decision orally, addressed counsel as follows:

"Gentlemen, in this case of South Utah Mines & Smelters, a corporation against Beaver County, I have given very careful consideration to the briefs that have been filed, and while I do not feel as sure as I would wish I felt about the matter, I have reached my conclusion.

The point as to which I am uncertain is as to the constitutionality of this provision of the Utah Constitution, and the statute passed in pursuance of it, in regard to the taxing of mines. The brief of the plaintiff in this case upon that proposition is, without attempt-
26 ing to pay any particular compliments, certainly a very strong one, but it has not convinced me to the extent that I would feel justified in pronouncing those provisions of the Constitution of Utah, and the statute passed in pursuance of it, unconstitutional, as being contrary to the Constitution of the United States. I think a court should hesitate—I believe that is the law—unless fairly convinced of it, to pronounce a provision of a state constitution and a statute passed in pursuance of it as being in contravention of the Constitution of the United States, and, as I have already said, I am not so satisfied of that proposition that I am willing to so pronounce. Where there is a doubt as to the constitutionality of a law, its constitutionality ought to be sustained. And so I am sustaining the constitutionality of these provisions of Section 4 of Article XIII of the Constitution of Utah and of the statute subsequently passed in pursuance thereof.

The other propositions involved in the case do not give me so much trouble. After careful consideration of this contract between the plaintiff and the leasing company, I am satisfied that it did not constitute a sale of this dump, but was merely a contract for recovering the metal content of the dump.

As to whether or not that dump was a part of the mine, I think that may be considered as settled by the decision of this court by Judge Johnson. It is true that in that decision he speaks of the dump in that case as being a product of the mine, and stress is laid upon that in the brief of the plaintiff in this case, but coupling that with the decision cited therein of the Supreme Court of the State of Utah, I think that no fair construction can be put upon that opinion other than that it was there held that the dump was a part of the mine and continued to be such and would continue to be such until the metal content contained therein had been recovered, or whatever term the mine people use about that. Now, that being the case, I feel obliged to hold that the dump in this case was a part of
27 the mine; certainly a part of the mine for purposes of taxation under the law of Utah, and if a part of the mine, must, of course, be taxed according to the provisions of the taxing law on that subject.

As to the taxing law of this state on that subject, it seems to me that considering the inevitable uncertainty of the value of any metalliferous mining property in this state, the rule adopted by the Constitution and the statute passed in pursuance of it, furnish a reasonable basis of classification; and it also appears to me that, while that classification may in a great many cases produce inequality of taxation between mining properties or mines as such and other kinds of property in the state, that would not render the law unconstitutional. I think under the decisions which have been cited, extracts from which I have read with care, the State has the power to discriminate between different kinds of property and the method and rate of taxation on different kinds of property within the State, and even if inequalities are produced, that would not make the law contrary to the provision of the Constitution as to securing to all persons the equal protection of the law.

The classification made, it seems to me, is about as reasonable as any classification can be made as to such property, and it certainly is intended to bear equally upon all property of the particular class, and while it may in some cases work a hardship, I hardly think that such hardship would cause the classification to be an improper one.

The subject of taxation is a difficult one and it is very hard to pass any law that will produce absolute equality, an equality as to all the property in the state, and also quite hard to produce absolute equality amongst owners of the property falling within a class. That can only be approximated. In many cases that might arise there will be positive wrong done to somebody, but that is inherent in the very nature of the subject dealt with.

28 Now, that being my view, I feel obliged to hold that this provision of the Utah Constitution, and of the statute passed in pursuance of it, is not in contravention of the Constitution of the United States, and that the only method by which this particular dump could be taxed is the method pursued by the taxing officers.

In this case, it seems to work a hardship on the mining company because it seems to throw upon the mining company the payment of the entire tax and leaves the leasing company free from that burden, but it seems to me that that should have been provided for in the contract between the mining company and the leasing company, and that in view of the decision of the Supreme Court of Utah, which had already been rendered, holding that a dump is a part of the mine from which it came, the parties drawing that contract should have made some provision as between this mining company and leasing company as to the payment of those taxes; and it seems to me if they have failed to do so, that this court cannot help them out. I have wished while considering this case that I could find some solution of the problem by which I could make them pro rate between themselves that tax, but I know of no way by which that can be accomplished. You can, therefore, draw an order directing judgment to be entered in favor of the defendant.

Now, a writ of error can be taken from that judgment directly to

the Court of Appeals, and while I do not advise, I can see very well that it would be very appropriate and I think almost incumbent upon the attorneys for the plaintiff in this case to take such a writ of error, because, as I have already said, I do not feel that I can be absolutely sure that this law is constitutional; I can only say this, that I am not sure that it is not, and I think you had better go to the Court of Appeals and find out from those 29 who have the last say in the matter as to that question, possibly on to the Supreme Court of the United States; maybe you can go directly to the Supreme Court of the United States; if you can, I think it would be well to go on there and be done with it and let's have it settled.

I hope I have made myself understood.

I have not written an opinion in this case. I do not write opinions, gentlemen; I decide cases, and I only state the grounds of my decision far enough and fully enough to enable counsel to know the grounds on which it is rested.

Where there are two judges in the same court, I consider that, where a question has been passed upon by one of those judges, like Judge Johnson and myself, it would be hardly proper for the other judge to hold differently. That is the way I feel in this case. I do not mean to say that I don't think Judge Johnson's decision is correct, but whether correct or not, I would feel obliged to say that that is the law of this court. It may not be the law anywhere else, but it is the law of this court.

I would advise, if a writ of error is to be taken in this case, that it be done, papers be prepared, etc., before Friday, so that I may sign up everything that it is necessary for me to sign, before I go. If, however, that is inconvenient, if you will prepare those papers and send them to me at St. Paul at any time during the month of December, I shall be glad to sign and return them, so that they can be filed and you will be on the road to the happy land of appeals."

(Signed) MORRIS,
Judge.

Filed February 13, 1922, nunc pro tunc as of 17th day of November 1921.

(Signed) JOHN W. CHRISTY,
Clerk.

30 *Motion of Defendant to Make Entry Part of Record*

filed in said Court on the 25th day of February, 1922, which being entitled in this court and cause, is as follows, to-wit:

Now comes the defendant above named and moved the Court for an order making the record of the proceedings had before this court in connection with said cause on the 15th day of November, 1921, as noted and entered in the minute book or *h*ournal of this court,

and duly authenticated by the signature of the Judge thereof, a part of the record of said cause.

Dated this 25th day of February, 1922.

(Signed) HARVEY H. CLUFF,
Attorney General of the State of Utah;
WM. A. HILTON,
Assistant Attorney General of Utah,
Attorneys for Defendant.

Copy of the foregoing Motion received and service admitted this 25th day of February, 1922, notice of said Motion and hearing thereon, is hereby waived.

(Signed) C. C. PARSONS,
FISHER HARRIS,
Attorneys for Plaintiff.

Filed February 25, 1922.

(Signed) JOHN W. CHRISTY,
Clerk.

31 *Order Correcting Minute Book Entry November 15, 1921*

filed in said Court on the 9th day of March, 1922, which being entitled in this Court and cause, is as follows:

There having been submitted to this court defendant's motion to embody in the record of the above entitled cause for transmission to the Supreme Court of the United States upon writ of error herein the minute order of this court made the 15th day of November, 1921 as follows: At this day comes plaintiff by C. C. Parsons its attorney and the defendant by W. A. Hilton, Assistant Attorney General and this case having been submitted upon the evidence and arguments of counsel and taken under advisement, now after due consideration the court finds for the defendant, with direction to counsel for defendant to prepare and submit a judgment herein.

And it appearing to the court that said minute order ought not to be interpreted as a finding of facts in said cause, inasmuch as the only facts found therein were those special findings of fact made signed and filed as of the 17th day of November, 1921; and said minute order of the 15th day of November, 1921, having been made during the November term of this court, said term still continuing.

Now, therefore, it is ordered: That said minute order of the 15th day of November, 1921, be corrected to read as follows:

At this day comes plaintiff by C. C. Parsons its attorney and the defendant by W. A. Hilton, Assistant Attorney General, and this case having been submitted upon the evidence and arguments of counsel and taken under advisement, now after due consideration the court announces its decision for the defendant, and directs counsel for defendant to draw an order directing judgment

32 to be entered in favor of defendant. And that said minute order so corrected, together with a copy of defendant's motion

and this order thereupon and all other minutes of proceedings in said cause, and all orders entered therein, be embodied in the transcript of the record in the above entitled cause to be transmitted to the Supreme Court of the United States pursuant to writ of error herein allowed.

Dated this 6th day of March, 1922.

(Signed) PAGE MORRIS,
Judge.

Filed and entered March 9, 1922.
(Signed) JOHN W. CHRISTY,
Clerk.

Petition for Writ of Error

filed in said Court on the 15th day of February, 1922, which being entitled in this Court and cause, is as follows, viz:

And now comes South Utah Mines & Smelters, plaintiff herein and says:

That on the 17th day of November, 1921, the District Court entered a judgment herein in favor of the defendant and against this plaintiff in which judgment and the proceedings had prior thereto in this cause, certain error- were committed to the prejudice of this plaintiff, all of which will more in detail appear from the assignment of errors which is filed with this petition.

The plaintiff further shows that the judgment of the District Court in this case is subject to review by the Supreme Court of the United States under the provisions of Section 238 of the Judicial Code in that there is here involved the construction or application of the Constitution of the United States, and it is here claimed that Section 4 of Article XIII of the Constitution of Utah and Section 5864, Compiled Laws of Utah 1917, as amended by Chapter 114, Laws of Utah 1919, are in contravention of the Constitution of the United States.

33 Wherefore this plaintiff prays that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

(Signed) C. C. PARSONS,
FISHER HARRIS,
E. O. LEATHERWOOD,
Attorneys for Plaintiff.

Filed February 15, 1922.
(Signed) JOHN W. CHRISTY,
Clerk.

Assignment of Errors

filed in said Court on the 15th day of February, 1922, which being entitled in this Court and cause, is as follows: to wit:

The plaintiff assigns for error:

First. The findings of fact are not sufficient to support either the judgment or conclusions of law in that it is found by Finding No. 4 that the tailings dump or deposit therein referred to was in fact nether a mine nor a part of a mine, but instead a thing wholly separate and apart from plaintiff's mine and located some three miles away from said mine, on desert land non-mineral in character, an accumulation of tailings in the form of personal property. Being neither a mine nor part of a mine, that deposit was not taxable as a mine under the Constitution or laws of the State of Utah.

Second. The findings of fact are not sufficient to support either the judgment or conclusions of law in that upon the facts found as stated in assignment of error No. First hereof next preceding, said tailings deposit was a "valuable mineral deposit" within the provisions of Section 4, Article XIII, Constitution of Utah, and as such was taxable only at its full value and not at a multiple thereof.

34 Third. The findings of fact are not sufficient to support either the judgment or conclusions of law in that upon the facts found as stated in assignment of error No. First hereof preceding, said tailings deposit was a "valuable mineral deposit within the provisions of Section 5864, Compiled Laws of Utah 1919, and as such was taxable only at its full value and not at a multiple thereof.

Fourth. The findings of fact are not sufficient to support either the judgment or conclusions of law in that it is found by finding No. 6 that on the 13th day of January, 1914, plaintiff and Utah Leasing Company, a corporation, entered into the agreement annexed to plaintiff's complaint at its "Exhibit A," pursuant to which Utah Leasing Company took possession of said tailings deposit and removed therefrom its contents of copper, gold and silver and paid over to plaintiff a stipulated ten per cent royalty. But said agreement constituted a sale of said deposit by plaintiff to Utah Leasing Company and said deposit was no longer assessable as the property of the plaintiff and much less could it lawfully have been made the basis for the assessment of plaintiff's worked out worthless mine.

Fifth. The findings of fact are not sufficient to support either the judgment or conclusions of law in that it is found by finding No. 5 that on the 4th day of August, 1914, plaintiff closed down and ceased to operate it- said mine and that the same has not since been operated by plaintiff or anyone else, wherefore under the Constitution and laws of Utah plaintiff's mine was not taxable during any of said years, there being no net proceeds therefrom.

Sixth. The findings of fact are not sufficient to support either the judgment or conclusions of law in that it is found by finding No. 5 that on the 4th day of August, 1914, all the ores or metalliferous deposits in plaintiff's mine which could be profitably mined
35 therefrom under processes then known had been taken from said mine and at no time since said date could any of the

ores or metalliferous deposits left in said mine have been profitably mined therefrom under known processes and said mine has since said date been of no value; and in that by said finding No. 5 it was further found that on January 1, 1919, said tailings deposit was of the value of but $20,000.00, and in that by finding No. 10 it was found that the assessment herein complained of was made against plaintiff's mine and not upon said tailings deposit or dump. But the court by its judgment upheld the assessment of said mine at an assessed value of $361,641.00, which assessment and resulting tax was in violation of Section 3 of Article XIII of the Constitution of Utah, commanding a uniform and equal rate of assessment and taxation on all property in the State according to its value in money and requiring the adoption by the Legislature of such laws as shall secure a just valuation for taxation of all property, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property.

Seventh. The findings of fact are not sufficient to support either the judgment or conclusions of law in that upon the facts found, stated in assignment of error No. Sixth hereof next preceding, and upon the further finding that plaintiff's mine was not in operation, said assessment and tax were in violation of the provisions of Section 4 of Article XIII of the Constitution of Utah, whereby it is provided that all mines should be assessed at some multiple or sub-multiple of their net annual proceeds and that all other valuable mineral deposits should be assessed at their full value.

Eighth. The findings of fact are not sufficient to support either the judgment or conclusions of law in that upon the facts
36 found, stated in assignment of error No. Sixth hereof preceding, and upon the further finding that plaintiff's mine was not operated, said assessment and tax were in violation of the provisions of Section 5864, Compiled Laws of Utah 1917, as amended by Chapter 114, Laws of Utah 1919, whereby it is provided that all mines should be assessed at a value determined by multiplying by three the net annual proceeds thereof, and that all other valuable mineral deposits should be assessed at their full value.

Ninth. The findings of fact are not sufficient to support either the judgment or conclusions of law in that it is found by finding No. 6 that in the year 1918 the net earnings re*al*ized from the treatment of said tailings deposit amounted to the sum of $120,547.00. Wherefore, in compliance with the Constitution and laws of Utah, whereby it is provided that in arriving at the value of mines and mining claims the net annual proceeds derived from the working thereof shall be used as a basis to be multiplied by three, the product to be their value for taxation, said net earnings so derived from said tailings dump were multiplied by three and the product of $361,641.00 derived, and over plaintiff's protest applied for assessment as the value of plaintiff's mine. But said assessment so made was with an arbitrary and unlawful disregard of the actual or market

value of said mine and was in violation of that part of Section 1 of the Fourteenth Amendment to the Constitution of the United States wherein it is provided that no state shall deny to any person within its jurisdiction the equal protection of the laws.

Tenth. The findings of fact are not sufficient to support either the judgment of conclusions of law in that upon the facts found, stated in assignment of error No. Ninth hereof next preceding, each Section 4 of Article XIII of the Consti-tion of Utah, and
37 Section 5864, Compiled Laws of Utah, 1919, as interpreted by the court to conform with the conclusions of law and judgment, deny to persons within the state's jurisdiction the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States, for such assessment cannot, save by the remotest accident, if at all, be indicative of the actual value of the property assessed or even approximately such value and thereby impose an equal burden upon the members of the class so taxed.

Eleventh. The findings of fact are not sufficient to support either the judgment or conclusions of law in that upon the facts found stated in assignment of error No. Ninth hereof preceding, said assessment and levy and the enforced payment thereunder were a taking of plaintiff's property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

Twelfth. The findings of fact are not sufficient to support either the judgment or conclusions of law in that upon the facts found stated in assignment of error No. Ninth hereof preceding, Section 4 of Article XIII of the Constitution of Utah and Section 5864, Compiled Laws of Utah, 1917, as amended by Chapter 114, Laws of Utah 1919, as interpreted by the court to conform with said conclusions of law and judgment violate that part of Section 1 of the Fourteenth Amendment to the Constitution of the United States wherein it is provided that no state shall deprive any person of life, liberty or property without due process of law.

Thirteenth. The findings of fact are not sufficient to support either the judgment or conclusions of law in that upon the facts found, stated in assignment of error No. Ninth hereof pre-
38 ceding, Section 5864, Compiled Laws of Utah 1917, as amended by Chapter 114, Laws of Utah 1919, as interpreted by the court to conform with said conclusions of law and judgment, is in violation of Section 3 of Article XIII of the Constitution of Utah.

Fourteenth. The findings of fact are not sufficient to support either the judgment or conclusions of law in that upon the facts found, stated in assignment of error No. Ninth hereof preceding, Section 5864, Compiled Laws of Utah 1917, as amended by Chapter 114, Laws of Utah 1919, as interpreted by the court to conform

with said conclusions of law and judgment, is in violation of Section 4 of Article XIII of the Constitution of Utah.

Fifteenth. The pleadings are insufficient to support either the judgment or conclusions of law in that it is alleged by plaintiff's paragraph IV of its complaint and admitted by defendant in paragraph 1 of the answer, that the tailings dump or deposit therein referred to was in fact neither a mine nor a part of a mine, but instead a thing wholly separate and apart from plaintiff's mine and located some three miles away from said mine, on desert land non-mineral in character, an accumulation of tailings in the form of personal property. Being neither a mine nor part of a mine that deposit was not taxable as a mine under the Constitution or Laws of Utah.

Sixteenth. The pleadings are insufficient to support either the judgment or conclusions of law in that upon the admitted facts stated in assignment of error No. Fifteenth hereof next preceding, said tailings deposit was a "valuable mineral deposit" within the provisions of Section 4, Article XIII, Constitution of Utah, and as such was taxable only at its full value and not at a multiple thereof.

Seventeenth. The pleadings are insufficient to support
39 either the judgment or conclusions of law in that upon the admitted facts, stated in assignment of error No. Fifteenth hereof preceding said tailings deposit was a "valuable mineral deposit" within the provisions of Section 5864, Compiled Laws of Utah 1917, as amended by Chapter 114, Laws of Utah 1919, and as such was taxable only at its full value and not at a multiple thereof.

Eighteenth. The pleadings are insufficient to support either the judgment or conclusions of law in that it is alleged by paragraph VI of plaintiff's complaint and admitted by defendant in paragraph III of its answer that on or about the 13th day of January, 1914, plaintiff and Utah Leasing Company, a corporation, entered into the agreement annexed to plaintiff's complaint as its "Exhibit A," pursuant to which Utah Leasing Company took possession of said tailings deposit and removed therefrom its contents of copper, gold and silver and paid over to plaintiff a stipulated ten per cent royalty But said agreement constituted a sale of said deposit by plaintiff to said Utah Leasing Company, and said deposit was no longer assessable as the property of the plaintiff and much less could it lawfully have been made the basis for the assessment of plaintiff's worked out worthless mine.

Nineteenth. The pleadings are insufficient to support either the judgment or conclusions of law in that it is alleged by paragraph V of plaintiff's complaint and admitted by defendant in paragraph II of its answer that on the 4th day of August, 1914, plaintiff closed down its said mine and ceased to operate the same and that said mine has not since been operated by plaintiff or anyone else. Wherefore, under the Constitution and laws of Utah plaintiff's mine

was not taxable during any of said years, there being no net earnings therefrom.

40 Twentieth. The pleadings are insufficient to support either the judgment or conclusions of law in that it is alleged by paragraph VII of plaintiff's complaint, and admitted by defendant in paragraphs II, III and IV of its answer that the taxing authorities of the State of Utah in their assessment of plaintiff's mine for the year 1919 attempted to adopt the provisions of Section 5864, Compiled Laws of Utah 1917, as amended and appearing as Section 5864 in Chapter 114, Laws of Utah 1919, to the operations of said Utah Leasing Company and found that the so-called "net annual proceeds" derived from the treatment of said tailings dump had amounted to the sum of $120,547.00, for the year 1918; that said taxing authorities thereupon applied to said sum of $120,547.00 the multiple of three, prescribed by said section as amended, and arrived at the sum of $361,641.00, which last named sum the taxing authorities found to be the value of plaintiff's said mine for the purpose of assessment for the year 1919. But the court by its judgment upheld the said assessment of said mine at the assessed value of $361,641.00, which assessment and resulting tax in violation of Section 3 of Article XIII of the Constitution of Utah, commanding a uniform and equal rate of assessment and taxation on all property in the state according to its value in money and requiring the adoption by the Legislature of such laws as shall secure a just valuation for taxation of all property, so that ever- person and corporation shall pay a tax in proportion to the value of his, her or its property.

Twenty-first. The pleadings are insufficient to support either the judgment or conclusions of law in that upon the admitted facts stated in the assignment of error No. Twentieth hereof next preceding and by reason of the further admission occurring in paragraph II of defendant's answer to the effect that plaintiff's mine was
41 closed down on the 4th day of August, 1914, and had not since been operated by anyone, said assessment and tax were in violation of the provisions of Section 4 of Article XIII of the Constitution of Utah, whereby it is provided that all mines shall be assessed at some multiple or sub-multiple of their net annual proceeds and that all other valuable mineral deposits should be assessed at their full value.

Twenty-second. The pleadings are insufficient to support either the judgment or conclusions of law in that upon the admitted facts stated in assignment of error No. Twentieth hereof preceding and the further admission occurring in paragraph II of defendant's answer to the effect that plaintiff's mine was closed down and not operated, said assessment and tax were in violation of the provisions of Section 5864, Compiled Laws of Utah, 1919.

Twenty-third. The pleadings are insufficient to support either the judgment or conclusions of law in that upon the admitted facts stated in assignment of error No. Twentieth hereof preceding, said

assessment of plaintiff's mine was made with an arbitrary and unlawful disregard of the actual or market value of said mine in violation of that part of Section I of the Fourteenth Amendment of the Constitution of the United States, wherein it is provided that no state shall deny to any person within its jurisdiction the equal protection of the laws.

Twenty-fourth. The pleadings are insufficient to support either the judgment or conclusions of law in that upon the admitted facts stated in assignment of error No. Twentieth hereof preceding, each Section 4 of Article XIII of the Constitution of Utah and Section 5864 Compiled Laws of Utah XIII of the Constitution of Utah and Section 5864, Compiled Laws of Utah 1917, as amended by Chapter 114, Laws of Utah 1919, as interpreted by the court to
42 conform with the conclusions of law and judgment, deny to persons within the state's jurisdiction the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States, for such assessment cannot, save by the remotest accident, if at all, be indicative of the actual value of the property assessed or even approximate such value and thereby impose an equal burden upon the members of the class so taxed.

Twenty-fifth. The pleadings are insufficient to support either the judgment or conclusions of law in that upon the admitted facts stated in assignment of error No. Twentieth hereof preceding said assessment and levy and the enforced payment thereunder were a taking of plaintiff's property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

Twenty-sixth. The pleadings are insufficient to support either the judgment or conclusions of law in that upon the admitted facts stated in assignment of error No. Twentieth hereof preceding, Section 4 of Article XIII of the Constitution of Utah and Section 5864, Compiled Laws of Utah 1917, as amended by Chapter 114, Laws of Utah 1919, as interpreted by the court to conform with the said conclusions of law and judgment, violate that part of Section 1 of the Fourteenth Amendment to the Constitution of the United States wherein it is provided that no state shall deprive any person of life, liberty or property without due process of law.

Twenty-seven. The pleadings are insufficient to support either the judgment or conclusions of law in that upon the admitted facts stated in assignment of error No. Twentieth hereof preceding, Section 5864, Compiled Laws of Utah 1917, as amended by Chapter 114, Laws of Utah 1919, as interpreted by the court to conform with
43 said conclusions of law and judgment, is in violation of Section 3 of Article XIII of the Constitution of Utah.

Twenty-eighth. The pleadings are insufficient to support either the judgment or conclusions of law in that upon the admitted facts stated in assignment of error No. Twentieth hereof preceding, Section 5864, Compiled Laws of Utah 1917, as amended by Chapter

114, Laws of Utah 1919, as interpreted by the court to conform wi said conclusions of law and judgment, is in violation of Section 4 Article XIII of the Constitution of Utah.

Twenty-nine. The court erred in rendering judgment in favor the defendant and against the plaintiff.

Wherefore, the plaintiff prays that said judgment be reversed.

(Signed) C. C. PARSONS,
FISHER HARRIS,
E. O. LEATHERWOOD,
Attorneys for Plaintiff.

Filed February 15, 1922.
(Signed) JOHN W. CHRISTY,
Clerk.

Order Allowing Writ of Error

filed in said Court on the 15th day of February, 1922, which being entitled in this Court and cause, is as follows, to-wit:

This 15th day of February, 1922, comes the plaintiff by its attorney and files herein and presents to the court its petition praying for the allowance of a writ of error, and an assignment of errors intended to be urged by him, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as are proper in the premises.

On consideration whereof the court does allow the writ of error upon the plaintiff's giving bond according to law in the sum of one thousand ($1,000.00) Dollars.

44 (Signed) TILLMAN D. JOHNSON,
District Judge.

Filed February 15, 1922.
(Signed) JOHN W. CHRISTY,
Clerk.

Bond on Error

filed in said Court after approval, on the 15th day of February, 1922, the same being in words and figures following, viz:

In the United States District Court for the District of Utah, Central Division.

No. 6282. Law.

SOUTH UTAH MINES & SMELTERS, a Corporation, Plaintiff in Error,

vs.

BEAVER COUNTY, a Municipal Corporation.

Bond on Writ of Error at Law.

Know all men by these presents, that South Utah Mines & Smelters, a corporation organized and existing under and by virtue of the laws of the State of Maine, as principal, and Fidelity & Deposit Company of Maryland, a corporation organized and existing under and by virtue of the laws of the State of Maryland, qualified to do business and doing business in the State of Utah, and having authority to transact business pursuant to an Act of Congress entitled, "An Act relative to cognizance, stipulations, bonds and undertakings and to allow certain corporations to be accepted as surety thereon," (28 Stat. L. 279), as surety, are held and firmly bound unto Beaver County, a municipal corporation, defendant above named, in the full and just sum of One Thousand ($1,000.00) Dollars, to be paid to the said Beaver County, its successors and assigns; to which payment well and truly to be made we bind ourselves, our successors and assigns, jointly and severally, by these presents. Sealed with our seals and dated this 15th day of February, in the year of our Lord One thousand nine hundred and twenty-two.

45 Whereas, lately at a District Court of the United States in a suit pending in said court between South Utah Mines & Smelters, plaintiff, and Beaver County, defendant, a judgment was rendered against said South Utah Mines & Smelters and said South Utah Mines & Smelters having obtained a writ of error and filed a copy thereof in the Clerk's office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Beaver County citing and admonishing it to be and appear at a session of the Supreme Court of the United States to be holden at the City of Washington on the 15th day of April next.

Now the condition of the above obligation is such, that if the said South Utah Mines & Smelters shall prosecute said writ or error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

In witness whereof, said South Utah Mines & Smelters, as principal, has caused these presents to be executed in its name and behalf by its attorney, and said Fidelity & Deposit Company of Maryland, as surety, has caused these presents to be signed and its corporate seal to be hereunto affixed this 15th day of February, 1922.

SOUTH UTAH MINES & SMELTERS,
(Signed) By C. C. PARSONS,
Its Attorney.
FIDELITY & DEPOSIT COMPANY OF MARYLAND,
(Signed) By THOS. W. MUIR,
Attorney in Fact.

Attest:
[Corporate Seal.] GEORGE W. DAVY,
Agent.

STATE OF UTAH,
County of Salt Lake, ss:

46 Thos. W. Muir, being first duly sworn on oath, deposes and says: That he is the attorney in fact of the Fidelity & Deposit Company of Maryland, a corporation organized and existing under the laws of the State of Maryland, and that he is duly authorized to execute and deliver the foregoing obligation; that the said Fidelity & Deposit Company of Maryland is authorized to execute the same and has complied in all respects with the Act of Congress and the laws of the State of Utah with reference to becoming sole surety upon bonds, undertakings and obligations.

Affiant further sayd that Emil H. Selbach, whose address is Salt Lake City, Utah, has been appointed attorney upon whom process for the State of Utah may be served according to law.

(Signed) THOS. W. MUIR.

Subscribed and sworn to before me this 15th day of February, 1922.

[Notary Seal.] (Signed) GEORGE W. DAVY,
Notary Public, Residing at Salt Lake City, Utah.

My commission expires April 4th, 1924.

The foregoing bond is hereby approved this 15th day of February, 1922.

(Signed) TILLMAN D. JOHNSON,
Judge.

Filed February 15, 1922.
(Signed) JOHN W. CHRISTY,
Clerk.

Præcipe for Transcript of Record.

filed in said Court on the 10th day of March, 1922, which being entitled in this Court and cause, is as follows: viz:

To the Clerk of the District Court of the United States for the District of Utah:

You will please prepare transcript of the record in this cause to be filed in the Supreme Court of the United States under
47 the writ of error heretofore allowed in the above entitled cause, and to incorporate (by original or by copy as may be proper) into the transcript of the record the following pleadings, proceedings and papers on file, together with the endorsements placed thereon by your office, to-wit:

Complaint,
Answer,
Stipulation waiving jury,
Order of September 3, 1921, setting case for trial,
Minute Book entry of October 14, 1921, as to trial and taking of case under advisement,
Minute Book entry of November 15, 1921, announcing decision for defendant,
Judgment,
Motion to correct record by supplying findings of fact and conclusions of law,
Minute Book entry of February 13, 1922, as to filing findings of fact and conclusions of law nunc pro tunc as of November 17, 1921,
Findings of fact and conclusions of law and decision,
Motion of defendant filed Febry. 25, 1922,
Order filed March 9, 1922, correcting minute book entry of November 15, 1921, relating to decision of case and order for judgment,
Assignment of errors,
Petition for writ of error,
Order allowing writ of error,
Bond on writ of error,
Writ of error,
48 Citation on writ of error, admission of service and defendant's appearance,
Præcipe for transcript,
Clerk's certificate to transcript.

Said transcript to be prepared as required by law and the rules of the Supreme Court of the United States, and filed with the Clerk of said Supreme Court of the United States.

(Signed) C. C. PARSONS,
FISHER HARRIS,
Attorneys for Plaintiff in Error.

Due service of the above and foregoing præcipe is hereby acknowledged this 10th day of March, 1922.

(Signed) HARVEY H. CLUFF,
WM. A. HILTON,
Attorneys for Defendant in Error.

Filed March 10, 1922.
(Signed) JOHN W. CHRISTY,
Clerk.

The above præcipe is hereby approved.
(Signed) HARVEY H. CLUFF.
WM. A. HILTON.

49 In the United States District Court for the District of Utah, Central Division.

No. 6282. Law.

SOUTH UTAH MINES & SMELTERS, a Corporation, Plaintiff in Error,

vs.

BEAVER COUNTY, a Municipal Corporation.

Writ of Error.

UNITED STATES OF AMERICA *ss:*

The President of the United States of America to the Judges of the District Court of the United States for the District of Utah, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of the above entitled cause, which is in the said District Court before you, between South Utah Mines & Smelters, a corporation, plaintiff, and Beaver County, a municipal corporation, defendant, a manifest error hath happened, to the great damage of the said South Utah Mines & Smelters, plaintiff in error, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the City of Washington, on the 15th day of April, next, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done to correct that error, what of right, and according to the laws and customs of the United States, should be done.

50 Witness, the Honorable William H. Taft, Chief Justice of the United States, the 15th day of February, in the year of our Lord one thousand nine hundred and twenty-two, and of the Independence of the United States of America one hundred and forty-sixth.

[Seal of the United States District Court, District of Utah.]

JOHN W. CHRISTY,
Clerk of the United States District Court for the District of Utah.

In obedience to the command of the within Writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name and affix the seal of the United States District Court for the District of Utah this 27th day of March, A. D. 1922, and the 146th year of the Independence of the United States of America.

[Seal of the United States District Court, District of Utah.]

JOHN W. CHRISTY,
Clerk of the United States District Court for the District of Utah.

51-54 In the United States District Court for the District of Utah, Central Division.

No. 6282. Law.

SOUTH UTAH MINES & SMELTERS, a Corporation, Plaintiff in Error,

vs.

BEAVER COUNTY, a Municipal Corporation.

Citation.

UNITED STATES OF AMERICA, *ss:*

To Beaver County, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the City of Washington on the 15th day of April next, pursuant to a writ of error filed in the Clerk's Office of the District Court of the United States for the District of Utah, wherein South Utah Mines & Smelters is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and speedy justice be done to the parties in that behalf.

Given under my hand at Salt Lake City, in the district above named, this 15th day of February in the year of our Lord one thousand nine hundred and twenty-two.

TILLMAN D. JOHNSON,
Judge of the District Court of the United States for the District of Utah.

Attest:

[Seal of the United States District Court, District of Utah.]

JOHN W. CHRISTY,
Clerk.

Due and timely service of the foregoing citation is hereby accepted and We, Harvey H. Cluff, Attorney General, and Wm. A. Hilton, Asst. Attorney General of the State of Utah, and as such attornies for the defendant in error in the above entitled cause hereby
55 enter an appearance in the Supreme Court of the United States.

Dated at Salt Lake City, Utah, this 15th day of February, 1922.

HARVEY H. CLUFF,
Attorney General, and
WM. A. HILTON,
Asst. Attorney General of the State of Utah,
Attornies for Defendant in Error.

Lodged in Clerk's office February 15, 1922.

JOHN W. CHRISTY,
Clerk.

56 *Certificate of Clerk.*

UNITED STATES OF AMERICA,
District of Utah, ss:

I, John W. Christy, Clerk of the United States District Court for the District of Utah, do hereby certify that the foregoing pages numbered from one to fifty-two and including pages 3½, 7½ and 8½, making fifty-five pages both included, contain a full, true*m* correct and complete copy and transcript of the record, papers and proceedings designated in præcipe for transcript of the record in that certain action at law wherein South Utah Mines and Smelters, a corporation, is plaintiff, and Beaver County, a municipal corporation is defendant, numbered 6282 at law on the dockets of said Court, as full true and correct as the original thereof now remain of record and on file in my office, omitting the following papers and proceedings, not specified in said præcipe, to-wit:

March 26,'21. Summons.
April 11. Appearance of defendant.
July 15. Appearance as amicus curæ in another case.
Novr. 17. Certification of judgment roll.
Order extending time for bill of exceptions.
21. Cost bill of defendant and taxation by Clerk.
Jany. 3, '22. Order to transmit files to Page Morris.
Notice of motion to correct record.
Feby. 4. Order extending time for bill of exceptions.
13. Plaintiff's proposed bill of exceptions.
14. Notice to defendant of above.
22. Order extending time for bill of exceptions.
Proposed amendments to bill of exceptions.
25. Objections to allowance of bill of exceptions.

I further certify that the original writ of error and the original citation in this cause are hereto annexed and are transmitted herewith.

In witness whereof, I hereto subscribe my official signature and affix the seal of said Court at Salt Lake City, in said district, this 27th day of March, in the year of our Lord nineteen hundred and twenty-two and the 146th year of Independence of United States of America.

[Seal of the United States District Court, District of Utah.]

JOHN W. CHRISTY,
Clerk U. S. District Court for the District of Utah.

Endorsed on cover: File No. 28,811. Utah D. C. U. S. Term No. 321. South Utah Mines & Smelters, plaintiff in error, vs. Beaver County. Filed April 6th, 1922. File No. 28,811.

SUPREME COURT OF THE UNITED STATES.

October Term, 1922.

No. 321

SOUTH UTAH MINES AND SMELTERS, PLAINTIFF IN ERROR,

vs.

BEAVER COUNTY.

BRIEF OF PLAINTIFF IN ERROR IN REPLY TO DEFENDANT'S BRIEF UPON DEFENDANT'S MOTION TO DISMISS AND AFFIRM.

C. C. PARSONS,
FISHER HARRIS,
E. O. LEATHERWOOD.
Counsel for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

October Term, 1922.

No. 321

SOUTH UTAH MINES AND SMELTERS, PLAINTIFF IN ERROR,

vs.

BEAVER COUNTY.

BRIEF OF PLAINTIFF IN ERROR IN REPLY TO DEFENDANT'S BRIEF UPON DEFENDANT'S MOTION TO DISMISS AND AFFIRM.

STATEMENT.

The Motion to Affirm.

Defendant's motion to affirm "upon the ground that the questions upon which the decision of the cause depends are so frivolous as not to need further argument" we presume is made upon the theory that this court should hold the record here raises no question it can review, wherefore, the writ of error should be dismissed and the judgment below affirmed. Defendant has avoided in its brief any reference to the merits and we conclude that if the motion to affirm were ever intended as one within the contemplation of Section 5 of Rule 6 of this court it has been abandoned.

The Motion to Dismiss.

The November, 1921, term of the District Court for Utah, Central Division, began on the second Monday of November (November 14, 1921), and ended on the second Monday in April following (April 10, 1922). The Judicial Code, Ch. 5, Sec. 109; 2 U. S. Comp. Stat. 1916, Sec. 1100; 5 Fed. Stat. Ann., 2nd Ed., p. 593, also Tr. 1.

On November 15, 1921, and during the November term the court below orally delivered its opinion in this case. (Tr. 19, 20, 21.) On November 17, 1921, judgment was entered in form (Tr. 13, 14), wherein it was recited that "after due deliberation thereon the court delivered its findings and decision orally in open court on the 15th day of November, 1921, and ordered that judgment be entered in accordance therewith. Wherefore, by reason of the law and the findings aforesaid, it is ordered and adjudged * * *." This judgment referred to the court's oral opinion (Tr. 19, 20, 21), as the "findings and decision" upon which it rested, but the opinion of the court is not a finding of facts, either special or general. (Aetna Insurance Co. v. Boon, 95 U. S. 117, 24 L. ed. 395), and the record then contained no findings, either general or special.

On December 30, 1921, plaintiff made its motion to correct the record by making and filing in this cause such "findings and conclusions as to the court might seem proper, conformable to the court's decision in said action." (Tr. 14.) Notice of the motion was served upon defendant's counsel, the motion was heard and submitted, and in the words of defendant's counsel "over

the vigorous objection of defendant," was allowed. The court below made and entered its findings of fact and conclusions of law (Tr. 15 to 21, incl.), as of the 17th day of November, 1921, and directed judgment accordingly, which special findings and conclusions were filed on the 13th day of February, 1922, *nunc pro tunc* as of the 17th day of November, 1921, the November term of that court still continuing.

Notwithstanding the court's allowance of plaintiff's motion and the correction of the record by the making and filing of its findings in this cause than which no other findings had been made or filed, defendant insisted that a minute order of November 15, 1921 (Tr. 13), constituted the court's general finding of all the issues in defendant's favor and the only finding in the record, and moved the court to embody that minute order in the record on writ of error here. So brought to the court's attention prompt correction was made by its order of March 6, 1922 (Tr. 22, 23), wherein the court below, after setting out the minute order in question, proceeded to its correction, prefaced as follows:

> And it appearing to the court that said minute order ought not to be interpreted as a finding of facts in said cause, inasmuch as the only facts found therein were those special findings of fact, made, signed and filed as of the 17th day of November, 1921; and said minute order of the 15th day of November, 1921, having been made during the November term of this court, said term still continuing,
>
> Now, therefore, it is ordered: * * *.

Defendant rests its motion to dismiss principally on its assertion that, notwithstanding the trial court's above

announcement to the contrary, this minute order was a general finding, no vacation of which has been had. With the respect due to all parties concerned, defendant's motion on that ground does seem to us none short of impertinence.

It will be observed that counsel had not founded the judgment (Tr. 13, 14), upon this minute order as a finding of fact, but, on the contrary, had adopted the court's oral opinion as such finding and basis for judgment. The situation is somewhat similar to that in Board of Supervisors v. Kennicott, 103 U. S. 554, 26 L. ed. 486, wherein the effort was to interpret similar language in the judgment a general finding of fact, whereby to exclude from review the sufficiency of an agreed statement to support the judgment. This court said:

> It is true that in the judgment as entered it is stated that the court found the issue in favor of the plaintiffs; but that, when read in connection with the bill of exceptions, is no more than a declaration that the court found the law to be in favor of the plaintiffs on the case as stated.

In the present case, however, the record is further fortified by the court's express statement quoted above, and our respect for the trial judge compels our conviction that the court below knew whereof it spoke and what it said.

Without discussing the merits, the significance of defendant's contention may be illustrated by reference to an issue raised by the pleadings. While most of the facts alleged in the complaint are admitted by the answer (Tr. 1 to 12, incl.,) yet by paragraph V of the complaint (Tr.

2), it is alleged that plaintiff's mine was on August 4, 1914, and had been at all times since that date worked out and of no value, which allegation was denied by paragraph II of the answer (Tr. 9) for want of information or knowledge to the contrary. The court found by its Finding No. 5 (Tr. 16) that,

> On the 4th day of August, 1914, all the ores or metalliferous deposits in said mine which could be profitably mined therefrom under processes then known had been taken from said mine and at no time since said date could any of the ores or metalliferous deposits left in said mine have been profitably mined therefrom under known processes, and said mine, as distinguished from said tailings deposit or dump, has since said date been of no value.

It is admitted by the pleadings that that mine was taxed at an assessed valuation of $361,641.00 (alleged in paragraph VII, Complaint, Tr. 3, and admitted by paragraph IV of Answer, Tr. 10). Defendant seeks to improve its position in this court by eliminating the finding that plaintiff's mine so assessed was of no value, thereby, we conclude, to raise a presumption here that this mine possessed a value reasonably near that at which it was assessed, i. e., $361,641.00. It is apparent from the record that the trial court did not sanction that effort and proceeded to a correction of the record then before it to make that record speak the truth by embodying therein the finding the court had made, but which through inadvertence or mistake had failed to become a part of the record in the case. All of this was done during the term at which the judgment was entered.

BRIEF ON THE LAW.

I.

Point.

A court has complete control of its judgments, orders, and decrees during the term at which they are rendered and may in the promotion of justice amend, correct, revise, supplement, supersede or vacate them as may in its discretion appear proper.

The above generally recognized rule was stated by this court in Bronson v. Schulten, 104 U. S. 410, 26 L. ed. 797, 799, as follows:

> It is a general rule of the law, that all the judgments, decrees or other orders of the courts, however conclusive in their character, are under the control of the court which pronounces them during the term at which they are rendered or entered of record, and may then be set aside, vacated, modified or annulled by that court.

In Ex Parte Lange, 85 U. S. (18 Wall.) 163, 21 L. ed. 872, 876, it is said that:

> The general power of the court over its own judgments, orders and decrees, in both civil and criminal cases, during the existence of the term at which they are first made, is undeniable.

And to the same effect see:

> Aspen Mining & Smelting Co. v. Billings, 150 U. S. 31, 37 L. ed. 986.

In Basset v. United States, 9 Wall. 38, 19 L. ed. 548, this court referred to the exercise of such control by the trial court over its judgments during the term as being "of every day practice."

In Phillips v. Ordway, 101 U. S. 745, 751, 752, 753, 25 L. ed. 1040, 1043, the rule is stated as follows:

> The second objection is, as we think equally untenable. The motion, as made, was nothing more than an application to the court to vacate a decree, which had been entered at a former day in the term, improvidently and without sufficient consideration. It was addressed entirely to the discretion of the court, and depended on facts within the knowledge of the justices. It was in no just sense a petition for rehearing, and even if it had been, we should not be inclined to reverse a decree because of what was, under the circumstances, an immaterial departure from technical rules. * * * Neither one of the parties was finally discharged from the court until the term ended, and each was bound to take notice of whatever was done affecting his interests in the suit until a final adjournment actually took place.

To the same effect are:

Henderson v. Carbondale Coal & Coke Co., 140 U. S. 25, 11 Sup. Ct. 691, 35 L. ed. 332, 338;

Barrell v. Tilton, 119 U. S. 637, 7 Sup. Ct. 332, 30 L. ed. 511, 512, 513;

Doss et al. v. Tyack et al., 55 U. S. 14, How. 297, 313, 14 L. ed. 428, 435.

The Circuit Court of Appeals for the Seventh Circuit, held in Southern Pacific Co. v. Kelley, 187 Fed. 937, 939:

> The right of the trial court to set aside, vacate or modify its earlier rulings and judgment in the cause, even at any time during the term * * * is settled beyond controversy throughout the Federal jurisdiction.

To the same effect:

Mahler v. Animarium Co., 129 Fed. 897, 900, 64 C. C. A. 329;

Judson v. Gage, 98 Fed. 540, 543, 39 C. C. A. 156.

We also quote from Wyler v. Union Pacific Ry. Co., 89 Fed. 41, 42, as follows:

> It is insisted by plaintiff's counsel that after the action and judgment of the court on the 11th day of November, 1897, the defendant had no right to complain thereof, or to move to set the same aside, and that the court erred in sustaining said motion and vacating said judgment. Said actions of the court were taken at and during the continuation of the November term 1897, of court. It is the common learning of the law that, "during the term wherein any judicial act is done, the record remaineth in the breast of the judge of the court, and in his remembrance, and therefore the roll is alterable during that time as the judge shall direct; but, when the term is past, then the record is in the roll, and admitteth no alteration, averment, or proof to the contrary." 2 Co. Litt., p. 260, Sec. 438. So, it is said in Ashby v. Glasgow, 7 Mo. 320, that "when a final judgment is rendered in a cause, and that judgment is erroneous, it may, during the term at which it was rendered, be set aside; for during the term all the proceedings are in the breast of the judge, and they may be altered or vacated as justice requires."
>
> It was perfectly competent for the court, during the term at which the judgment of November 11, 1897, was rendered, if satisfied it had committed error in its action, to have *sua sponte* corrected its error by setting the entry aside.

In Burlingame v. Central R. of Minn., 23 Fed. 706, 707, 23 Blatch. 142, the trial court two days after a jury returned its verdict, directed the jury to be recalled and permitted them to amend their verdict. The court held:

> The correction is not an impeachment of the verdict by the jurors in any sense. It upholds the real verdict, and prevents miscarriage in its delivery into

court. The verdict as first recorded was not the real verdict of the jury. If it could not be corrected, it should be set aside. Neither party has moved for that.

In the case of Parker v. Whittier, 91 Fed. 511, the Circuit Court of Appeals for the First Circuit held that it was the duty of the trial court to make a finding upon an important issue of fact one way or the other upon the evidence submitted to it and reversed the court below for three errors, the first of which in enumeration was, "a failure to make any finding upon the issue of fraud raised by the pleading." It does not appear in that case that any request had been made for findings of fact.

And so as to the making of findings of fact subsequent to entry of judgment the Circuit Court for New York, Southern Division, in Joline v. Metropolitan Securities Company, 164 Fed. 650, held as follows,

Quoting from the syllabus:

> In an action at law tried in a circuit court without a jury by stipulation under Rev. St., Sec. 649 (U. S. Comp. St. 1901, p. 525), the defeated party is entitled to have the court make special findings of fact when it is doubtful under the decisions whether he could otherwise properly present to an appellate court the questions of law involved.

And from the opinion,

> In this case, tried before me, a jury was waived in writing, and I have directed judgment to be entered for the plaintiffs, 164 Fed. 144. The defendant now requests me to make special findings of fact on the ground that under a general finding it will not be able to raise important questions of law if the case reaches the Supreme Court. On the other hand, the

plaintiffs insist that these questions may be raised * * * They say, further, that special findings should not be made because the judgment they have recovered will be imperiled on account of the difficulty of making findings that will pass muster in the court * * *.

Consideration of the decisions of the Supreme Court satisfies me that the defendant is justified in apprehending that its rights may be prejudiced if I make only a general finding, and I therefore think it fair to make special findings. Counsel for either party may submit findings within 10 days, bearing in mind that I can only find the ultimate facts.

II.

Point.

Correction of the record by supplying at a *subsequent* term findings upon which to found a judgment has been approved by this court.

The situation presented by the case of Aetna Insurance Co. v. Boon, 95 U. S. 117, 24 L. ed. 395, although applied to the limited discretion of the trial court after the expiration of the term wherein its judgment was rendered is strikingly similar to that in the present case and we quote as follows from that decision wherein concerned with the question presented here:

> There must be a finding of facts, either general or special, in order to authorize a judgment; and that finding must appear on the record. In this case, there was no formal finding of facts when the judgment was ordered. It is to be inferred, it is true, from the judgment and from the entry of the clerk, that the issue made by the pleadings was found for the plaintiffs, but how, whether generally or specially, does not appear. There was, therefore, a de-

fect in the record, which it was quite competent for the court to supply by amendment; and such an amendment was made. After the close of the April term, and in the vacation next following, the judge of the court, on application of the defendants granted an order upon the plaintiffs to show cause why the defendant should not have leave inter alia to make and serve * * * special findings of fact and law. * * * Upon this rule both parties were heard; and the result was an order that "a finding of facts in the cause, with the conclusions of the court thereupon, conformable to the opinion of the court theretofore filed" be prepared to be approved by the court at the next following term (September). * * * Had the court power to make such an order respecting a special finding, and, if it had, does the order have the effect of making the special finding a part of the record. * * * It is familiar doctrine that courts always have jurisdiction over their records to make them conform to what was actually done at the time; and, whatever may have been the rule announced in some of the old cases, the modern doctrine is that some orders and amendments may be made at a subsequent term, and directed to be entered and become of record as of a former term. In Rhoads v. Com., 15 Pa. 276, Chief Justice Gibson said: "The old notion that the record remains in the breast of the court only to the end of the term has yielded to necessity, convenience and common sense. Countless instances of amendment after the term, but ostensibly made during it, are to be found in our own books and those of our neighbors." Even judgments may be corrected in accordance with the truth. It has been held by this court that at a subsequent term, when a judgment had before been arrested, an amendment may be made to apply the verdict to a good count, if another be bad, and the minutes of the judge show that the evidence sustained the good one. Matheson v. Grant, 2 How. 282. And this has been repeatedly held elsewhere.

> Generally, it may be admitted that judgments cannot be amended after the term at which they were rendered, except as to defects or matters of form; but every court of record has power to amend its records, so as to make them conform to and exhibit the truth. Ordinarily, there must be something to amend by; but that may be the judge's minutes or notes, not themselves records, or anything that satisfactorily shows what the truth was. Within these rules, we think, was the order made at September term, that the special finding of facts and conclusions of law be signed by the judges and allowed, conformably to the opinion of the court theretofore filed. * * *

The dissenting opinion proceeds upon the theory that "inasmuch as the term in which the judgment was rendered had then expired, it is clear that the court below had not at that time any power to supply a special finding of facts." 95 U. S., at 143; 24 L. ed., at 403.

Attention is directed to the fact that in the present case no exception was taken nor sought to the special findings made by the court, the motion being in substance that the court include in the record whatever its findings may actually have been. (Tr. 14.) The assignment of errors here is directed only to the sufficiency of the pleadings and the facts found to support the judgment.

At pages 13 and 14 of defendant's brief counsel have quoted from Marye v. Strause, 5 Fed. 498, wherein Insurance Co. v. Boon, supra, was distinguished from that case. But the distinction between Marye v. Strause, and the present case is equally apparent from that quotation, indeed one cannot find a single point of similarity.

The cases disclose many instances wherein more or less similar corrections of the record have been made

after the expiration of the term wherein the judgment was entered, among which are the following:

Bernard v. Abel, 156 Fed. 649, 652, 653;

Mellon v. St. Louis Union Trust Co., 240 Fed. 359, 360;

Lynah v. United States, 106 Fed. 121, 122, 123;

The Martello, 153 U. S. 64; 38 L. ed. 637.

Such correction has also been approved even after appeal or perfecting of writ of error, it having been held by this court in Murphy and Darrington, Adm'rs. v. Stewart, Adm'r., 2 How. 263, 11 L. ed. 261, 268, as follows:

> Nothing is more common than motions to amend the record after a writ of error has been brought; nay, after a writ of error has been argued in the court above, and sometimes even after judgment in the court of error, pending its session. Especially in cases of misjoinder of counts, which are incompatible with each other, as well as in cases where there are several counts, some of which are bad and some good, and a general verdict given for the plaintiff; such applications, when made within a reasonable time, are usually granted after error brought and the verdict allowed to be amended so as to be entered upon the good counts, or upon the counts not incompatible with each other. This is most usually done upon the judge's notes of the evidence at the trial, especially upon what counts the evidence was in fact given or to which it was properly addressed or limited. But it may be done upon any other evidence equally clear and satisfactory, which may be submitted to the consideration of the court * * * The practice is a most salutary one, and is in furtherance of justice and to prevent the manifest mischiefs from mere slips of counsel at the trial, having nothing to do with the real merits of the case.

To like effect see:

Hovey v. McDonald, 109 U. S. 150, 27 L. ed. 888, 890, 891;

Ommen v. Talcott, 180 Fed. 925, 927.

III.

Point.

A motion to correct a defective record is addressed to the trial court's discretion and that court's action thereon is not subject to review.

Upon this point reference is made to the following:

United States v. Atchison, T. & S. F. Ry. Co., 270 Fed. 1, 4, wherein it was held by the Circuit Court of Appeals for the Eighth Circuit, as follows:

> The making of special findings of fact in an action at law tried by the court on a waiver of a jury is discretionary with the trial court, and its action in making such findings, in refusing to make requested findings, or in refusing to amend findings made, is not subject to exception, or to a subsequent review in a federal appellate court. * * *
>
> Again, the trial ended in this case when * * * the court * * * filed its findings of fact and its conclusion that judgment must be entered for the defendant. After that filing it was too late to take exceptions to rulings of the court on the issues tried, and no requests for findings or for modifications of findings were made by the plaintiff until subsequent to the close of the trial. Such subsequent requests and ruling thereon are, like motions for new trials after verdicts and the rulings thereon, discretionary with the trial court, and are not subject to review in the federal appellate courts.

In Re Rochester Sanitarium & Baths Co., 222 Fed. 22, 26, 137 C. C. A. 560.

Slicer et al. v. The Bank of Pittsburg, 16 How. 571, 14 L. ed. 1063, 1066, wherein this court held:

> But the court had the power to make the amendment, which they did make, and which removed the objection, by causing the judgment to be entered *nunc pro tunc.* This was a duty discharged by the court, in the exercise of a discretion, which no court can revise.

Harvey Terry v. The Commercial Bank of Alabama, 92 U. S. 454, 23 L. ed. 620, 621, wherein this court said:

> Plaintiff below appeared in person, and filed numerous petitions and affidavits signed by himself, excepting to the decree, asking to set it aside; excepting to the reports, and suggesting many other matters and things in which he sought to modify or correct the decree. * * *
>
> As to all this, it is sufficient to say, that these motions cannot be considered here. They are mainly addressed to the discretion of the court, coming as they do after a final decree on the merits.

Phillips v. Negley, 117 U. S. 665, 671, 29 L. ed. 1013, 1014;

Sheppard et al. v. Wilson, 6 How. 260, 12 L. ed. 430;

Mason v. Smith, 191 Fed. 502, 112 C. C. A. 146;

S. M. Hamilton Coal Co. v. Watts, 232 Fed. 832, 834;

Hall v. Houghton & Upp. Merc. Co., 60 Fed. 350, 351, 8 C. C. A. 661.

Lincoln Nat. Bank v. Perry, 66 Fed. 887, 888, 889, wherein the Circuit Court of Appeals for the Eighth Circuit held:

> The power to correct mistakes in its record, occasioned by oversight, which are of such nature that the record does not show what was in fact done or decided, is a power that is inherent in all courts of

superior jurisdiction, and is frequently exercised in furtherance of justice. * * * It seems also, that the power to thus correct mistakes in the record may be exercised within any reasonable period, even after the lapse of the term at which the mistake was committed, and even after the erroneous record has been removed to an appellate court by appeal or writ of error. * * * But if we should concede that the circuit court acted erroneously, in correcting its record, then it is questionable, to say the least, whether its action in that behalf is now subject to review. It assumed to correct its record on the theory that it was erroneous, owing to a mistake of the clerk. The defendants in error appeared, and resisted the application; but they failed to except to the order amending the record, or to bring the action of the trial court before this court for review by a writ of error. Under these circumstances, there are some authorities which maintain, with good reason, that such subsequent action of the trial court can only be reviewed by an appeal or writ of error, and that if not so challenged, it must be accepted as conclusive. * * * Without pursuing this branch of the case further it is sufficient to say that we conclude that the motion to dismiss the writ of error should be denied.

IV.

Point.

The assignments of error Nos. 15 to 28, incl., (Tr. 27 to 30, incl.), are directed to the insufficiency of the pleadings to support the judgment, which assignments present questions reviewable here, wherefore, if for no other reason, defendant's motion to dismiss should be denied

Upon this point reference may be made to the following:

It was held in City of Mankato v. Barber Asphalt Paving Co., 142 Fed. 329,333, 73 C. C. A. 439:

A jury having been waived and no special finding of facts requested or made, there is nothing to review except the questions: Whether the judgment as rendered is supported by the pleadings? Whether there is any substantial evidence to support it? And whether error was committed in the admission or exclusion of evidence? * * * Most of the important facts relied on by defendant city to defeat recovery appear in the pleadings. For this reason we are fortunately able to consider their merits unembarrassed by the rule just stated.

Marinette Saw mill Co. v. Scofield, 174 Fed. 562, 98 C. C. A. 344;

Otoe County v. Baldwin, 111 U. S. 1, 28 L. ed. 331, 4 Sup. Ct. 265;

Lehnen v. Dickson, 148 U. S. 71, 13 Sup. Ct. 481, 37 L. ed. 373;

Norris v. Jackson, 9 Wall. 125, 19 L. ed. 608, 609;

Flanders v. Tweed, 9 Wall. 425, 19 L. ed. 678, 680;

World's Columbian Exposition Co. v. Republic of France, 91 Fed. 64, 69, 33 C. C. A. 333.

CONCLUSION

We have examined the authorities cited in defendant's brief and as we understand the law they are not in point. In the case of Corliss v. Pulaski County, 116 Fed. 289, the application was not to correct or amend the record by *nunc pro tunc* order, whereby to cure a defect by supplying findings that while in fact made had not been embodied in the record. The trial court had found the issues generally for the defendant, which finding the record disclosed no intention of altering. The paper asserted as a finding of fact appeared in that case as mere

surplusage. We will not undertake a discussion of each of these authorities. Some of them we have ourselves cited in support of our points. One of them, Calaf v. Fernandez, 239 Fed. 795, from which counsel quote at length (Defendant's Brief, pp. 8, 9, 10, 11), holds that "while it is quite likely within the discretion of the court to make special findings after it has rendered a general verdict in a case submitted to it without the intervention of the jury, it is not at all plain that a defeated party is entitled, as of right, to special findings upon requests filed subsequent to the general finding or decision." This seems to us an answer to defendant's motion here. Under the law, as we view it, defendant's motion to dismiss and affirm is without any semblance of merit and should be denied.

Respectfully submitted,

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Counsel for Plaintiff in Error.

In the Supreme Court of the United States

October Term, 1922

No. 321

SOUTH UTAH MINES & SMELTERS,

Plaintiff in Error,

vs.

BEAVER COUNTY,

Defendant in Error.

In Error to the District Court of the United States, for the District of Utah.

BRIEF OF DEFENDANT IN ERROR IN SUPPORT OF MOTION TO DISMISS AND AFFIRM.

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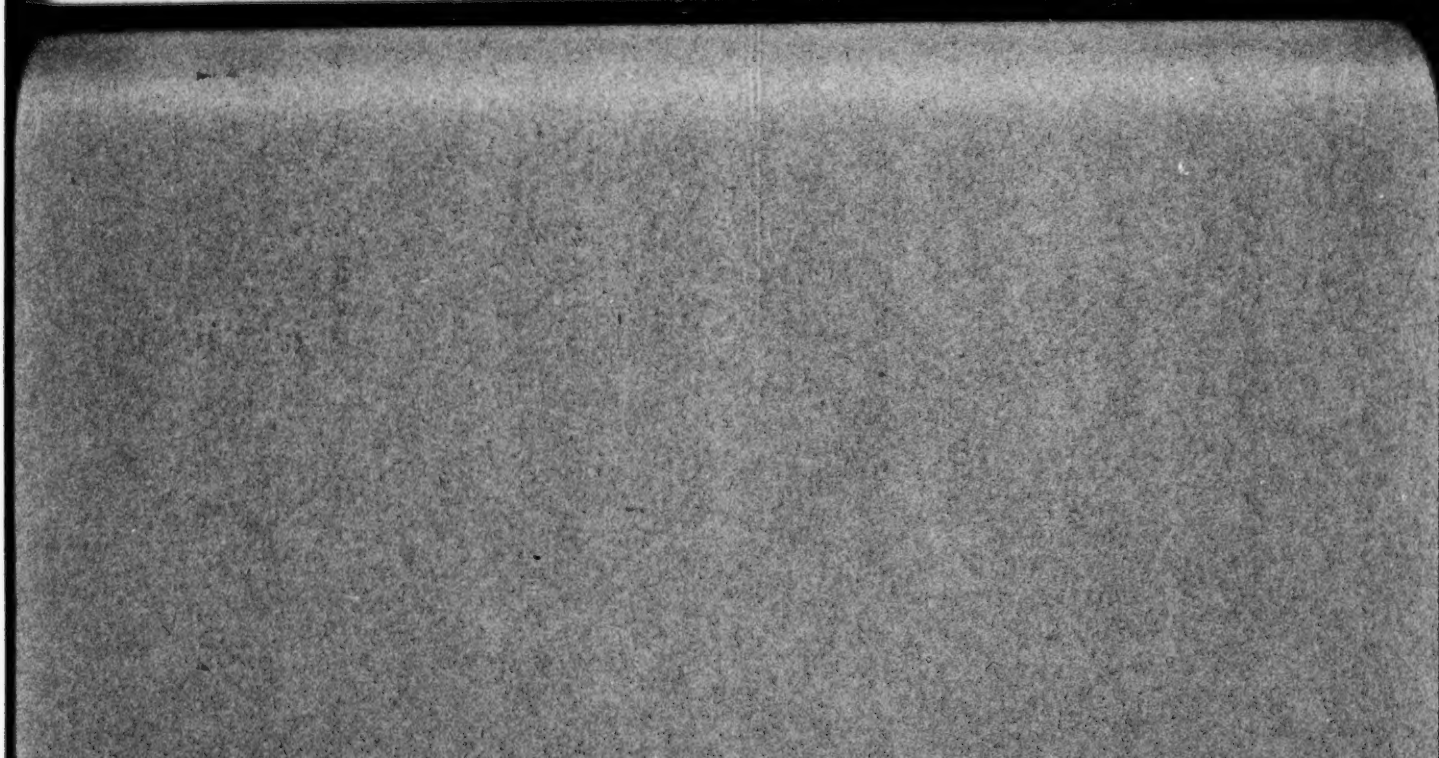

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STATEMENT.

This case was tried to the court, a jury having been waived upon stipulation of counsel. No exceptions were made to any ruling of the Court during the progress of the trial. There is no bill of exceptions. No request was made for special findings and no request was made

for a declaration of the law during the progress of the trial. The Court, on November 15th, 1921, announced its decision and general finding orally in open court. (Trans. 13, 14 and 19.) The reasons of the Court in arriving at its general finding are found on pages 19, 20 and 21 of the transcript, and after stating its reasons fully, the Court (p. 20), says:

> "You can therefore draw an order directing judgment to be entered in favor of the defendant."

On the same day (November 15, 1921), a journal entry, signed by the judge of the court personally, was made, which journal entry appears on page 13 of the transcript, and reads as follows:

> "At this day, comes plaintiff, by C. C. Parsons, its attorney and the defendant, by Wm. A. Hilton, Assistant Attorney General. And this cause having been submitted upon the evidence and arguments of counsel, and taken under advisement, now after due consideration the Court *finds for the defendant,* with direction to counsel for defendant to prepare and submit a judgment herein." (Italics ours.)

The plaintiff made no motion in arrest of judgment and made no motion for a new trial.

On the 13th day of February, 1922, nearly three months after the entry of judgment on the general find-

ing, the Court, on motion of plaintiff, over the vigorous objection of defendant, made and filed special findings *nunc pro tunc.*

The defendant, on February 25, 1922, after the filing of the special findings, moved (Trans. 21) that the minute (journal) entry of November 15, 1921, be made a part of the record for transmission to the Supreme Court. The plaintiff immediately sought a correction of the said minute entry and on its motion the Court made and filed an order (Trans. 22), purporting to correct the said minute entry of November 15, 1921; but said correction order does does not vacate the former action of the Court in orally announcing its general finding or change the effect of the general finding found in the journal entry, for the journal entry, as it stands corrected, is itself tantamount to a general finding for defendant. It reads: (Trans. 22.)

> "At this day (November 15, 1921,) comes plaintiff by C. C. Parsons its attorney and the defendant by Wm. A. Hilton, Assistant Attorney General, and this case having been submitted upon the evidence and arguments of counsel and taken under advisement, now after due consideration the Court *announces its decision for the defendant*, and directs counsel for defendant to draw an order directing judgment to be entered in favor of defendant." (Italics ours.)

There is, therefore, of record in the case both a general finding for defendant and special findings, with the general finding preceding the special findings.

ARGUMENT.

It is a well established principle of law, in causes tried by the Court without the intervention of a jury upon written stipulation of counsel, where there was no demurrer to the sufficiency of any of the pleadings, no exceptions to the rulings of the Court during the progress of the trial in the admission or exclusion of evidence, or otherwise, no bill of exceptions, no request for special findings, no request for a declaration of the law, no motion in arrest of judgment and no motion for a new trial, and the finding of the court is general, that no question of law is presented which can be reviewed by the appellate court. Insurance Company vs. Tweed, 7 Wall. 44, Norris vs. Jackson, 9 Wall. 125; Flanders vs. Tweed, 9 Wall. 425; Miller vs. Life Insurance Company, 12 Wall. 285; Dickinson vs. Planters Bank, 16 Wall. 250; Insurance Company vs. Folsom, 18 Wall. 237; Insurance Company vs. Sea, 21 Wall. 258; Martinton vs. Fairbanks, 112 U. S. 670; Raymond vs. T. Parish, 132 U. S. 192; Glenn vs. Fant, 134 U. S. 398; Lloyd vs. McWilliams, 137 U. S. 576; British Queen Mg. Co. vs. Baker Silver Mg. Co., 139 U. S. 222; Lehmen vs. Dickson, 148 U. S. 71.

The finding of the trial court must be "either general or special." It cannot be both. And when both are made the general finding will not be disregarded. National Bank vs. Smith, 94 Fed. 605; Streeter vs. Sanitary Drainage District of Chicago, 133 Fed. 124; British Queen Mg. Co. vs. Baker Silver Mg. Co., 139 U. S. 222.

In British Queen Mg. Co. vs. Baker Silver Mg. Co., supra, this Court forcibly announced the rule in the following unequivocal language:

> "This case was tried by the Circuit Court, without a jury, and under paragraphs 649 and 700, Rev. Stats., the finding must be 'either general or special.' It cannot be both. Here there was a general finding.
>
> The record contains a bill of exceptions, but no exceptions to the rulings of the court in the progress of the trial of the cause were thereby duly presented, and although after reciting the evidence it is therein stated that 'the court thereafter and during the said term made the following findings of fact and judgment thereon,' which is followed by an opinion of the court assigning reasons for its conclusions, this cannot be treated as a special finding enabling us to determine whether the facts found support the judgment, *nor can the general finding be disregarded.*" (Italics ours.)

There was no request for special findings during the progress of the trial and none were made preceding the entry of judgment. The judgment was entered upon a

general finding orally announced by the Court and a record entry made of it on the Court's journal and duly signed by the judge of the court. The Court intended the general finding and duly entered the same. There was no omission or mistake to be corrected by the *nunc pro tunc* entry.

The purpose of a *nunc pro tunc* entry is, not to make an order now for them, but to enter now for them an order previously made. Klein vs. So. Pac., 140 Fed. 213-216.

A *nunc pro tunc* entry can only be made upon evidence furnished by the papers and files in the case, or something of record, or in the minute book, or just judge's docket as a basis to amend by. Becker vs. Deuser, 169 Mo. 159; 88 Om. St. Rep. 440.

The purpose of a *nunc pro tunc* entry is to amend the record by inserting what had been omitted by the act of the clerk or of the Court, but which had actually taken place during the progress of the proceeding. In re: Wight, 134 U. S. 136; Hickman vs. F. and Scott, 141 U. S. 415-418.

The making of findings by the national courts, on waiver of a jury, *and the effect thereof*, are governed by the acts of Congress (Rev. Stats., Sections 649 and 700), and the rules of the common law, and not by the statutes

of a state. Parks vs. Turner, 12 Howard 39; U. S. vs. Indian Grave Drainage District, 85 Fed. 928-930; Nudd vs. Burrows, 91 U. S. 426- 441; Indianapolis & C. R. R. vs. Horst, 93 U. S. 291-300; Mutual Accident Ass'n vs. Barry, 131 U. S. 100-119-120; Lincoln vs. Power, 151 U. S. 436-442; Chateaugoy Iron Co., Petitioner, 128 U. S. 544-554; Streeter vs. Sanitary Drainage District of Chicago, 133 Fed. 124-126; U. S. vs. U. S. Fidelity Co., 236 U. S. 512-529; Jones vs. U. S., 135 Fed. 518; Spokane and I. E. R. R. vs. Campbell, 217 Fed. 518-523.

Section 649, Rev. Stats., among other things provides that the finding of the Court shall have the same effect as the verdict of a jury, and it having been decisively settled that the findings, and the effect thereof, are governed by Sections 649 and 700, of the Revised Statutes, and the rules of the common law, a trial court would be without jurisdiction after the entry of judgment on a general finding (general verdict) to set aside or vacate the general finding and substitute therefor special findings. U. S. Fidelity & G. Co. vs. Board of Commissioners, 145 Fed. 144; Calaf vs. Fernandez, 239 Fed. 795; Corliss vs. Pulaski Co., 116 Fed. 289; Martinton vs. Fairbanks, 112 U. S. 670; Lehmen vs. Dickson, 148 U. S. 71; Wright vs. Hawkins, 36 Ind. 264; Barnett vs. Milnes, 148 Ind. 237; State vs. Elschinger, 122 S. W. 688; Austin vs. Differnaffer, 148 N. W. 907.

The finding of the Court, upon waiver of a jury, in order to have the same effect as the verdict of a jury must be subject to the restrictions of the common law relating to amendments. From a reading of what is said in Abbott's Civil Jury Trials, 3rd Edition, pp. 785 and 786, and in American Digest, 2nd Dec., Trials, Section 399, it is well established that the verdict of a jury becomes final after it has been pronounced and recorded in open court and the jury dismissed, and that thereafter the jury cannot be reassembled to alter their verdict.

In the case of U. S. Fidelity & G. Co. vs. Board of Commissioners, 145 Fed. 144-145-151, Judge Sanborn announces the following rules:

> "Any question of law is reviewable in a trial before a court without a jury, which is reviewable in a trial before a jury.
>
> This question is reviewable when the trial is by the court without a jury upon a motion for judgment, a request for a declaration of law, or any other action which fairly presents this issue of law to the trial court for determination before the trial ends.
>
> The trial ends when the finding is filed, or, if no finding is filed before, when the judgment is rendered."

In the case of Calaf vs. Fernandez, 239 Fed. 795-800-801, the Circuit Court of Appeals, 1st. Cir., Jan. 5, 1917, inter alia, said:

"As a result of this hearing on November 6, 1915, Judge Hamilton handed down an elaborate opinion in which he said, by way of conclusion, that the hearing was restricted to the matter of title, and that full consideration had been given to the subject, and then finally, in conclusion, made a general finding in the words following:

'The court therefore finds the issue of title in favor of the plaintiff, and directs that judgment be entered for the plaintiff on the whole case.'

Following this, and three days after the general finding had been made, and after judgment, there were requests for special findings, and upon this subject there were two opinions, with the result that the requests were denied, and, if we understand the case correctly, there were no requests for special findings during the course of the trial or before the general finding and judgment.

The motion for special findings is predicated upon section 649 and section 700 of the Revised Statutes of the United States (Comp. Sta. 1913, pars. 1587, 1668).

While it is quite likely within the discretion of a court to make special findings after it has rendered a general verdict in a case submitted to it without the intervention of the jury, it is not at all plain that a defeated party is entitled, as of right, to special findings upon requests filed subsequent to the general finding or decision. Section 649 provides that, when a cause is submitted to a court without a jury, the finding upon the facts may be either general or special, and that they shall have the same effect as the verdict of a jury. Section 700, in referring to Section 649, provides

that the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed by the Supreme Court upon a writ of error or upon appeal; and that when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment." * * *

"We cannot pass this question without observing that the request for special findings, in the form it was, and made as it was, after the cause had been submitted, considered, and decided, was very near the point of impertinency, because the court was asked to make specific findings of fact as to how the plaintiff made out or provided the title. It should be borne in mind that this request was first precipitated after a lengthy opinion giving a full explanation as to how the conclusion was reached. It is perfectly plain that it would neither be reasonable nor orderly for a judge, after he had rendered a general verdict, founded upon considerations which he had explained as its foundation, to enter upon an argument as to how the prevailing party made out or proved his case.

If, at the close of the proofs, the claim of the aggrieved party was that the evidence did not warrant a general finding or a general verdict for the plaintiff upon the question of title, because there was no evidence, or sufficient evidence, to warrant such a finding or such a verdict, a motion or a request that the court should find for the defendants, upon the ground that there was no evidence to warrant a finding or a verdict for the plaintiff, would have been a plain, simple and adequate remedy, because, in the event of the motion being denied, the aggrieved party might have brought up the entire evidence for review.

There would be no more decorum in asking a judge, after he had explained the case and rendered a general verdict, to make special findings as to how the result was reached than there would be in sending a jury back to the jury room, after rendering a general verdict, to make special findings as to the evidence in support of the verdict. Our conclusion on this branch of the case is that the court was right in not granting a motion for specific findings of fact as to how the plaintiff made out or provided the title."

In the case of Corliss vs. Pulaski Co., 116 Fed. 289, the Circuit Court of Appeals, 7th Cir., May 6, 1902, said:

"Here the court rendered a general finding for the defendant below, upon which judgment was entered. Some two months thereafter, but at the same term, the trial judge signed a bill of exceptions and also a paper purporting to be a special finding, which embodies as well the recital of a motion for a new trial, and of the judgment previously rendered, and of the exceptions taken to the action of the court. *This is wholly without authority of law. There was no order vacating the former action of the court, and substituting the special for the general finding, and then entering judgment thereon.* The general finding and the judgment stand unimpeached, not set aside or superseded by the subsequent special finding. The judgment was rendered upon the general, not upon the special, finding. The latter accompanies, and is manifestly a part of, the bill of exceptions. *A practice such as this tends toward confusion and cannot be sustained.* The rule of the statute is simple. The finding must be general or special, not both. With a general finding nothing is pre-

> sented for review, but questions apparent upon the record, or those arising at the trial, if properly reserved by exception." (Italics ours.)

In the case of Martinton vs. Fairbanks, 112 U. S. 670, 674, the Supreme Court said:

> "The provision of the statute, that the finding of the court shall have the same effect as the verdict of a jury, cuts off the right of review in this case. For the Seventh Amendment to the Constitution of the United States declares that 'no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law. The only methods known to the common law for the re-examination of the facts found by a jury are, either by a new trial granted by the court in which is issue had been tried, or by the award of a *venire facias de novo* by the appellate court for some error of law. *Insurance Co.* v. *Folsom, ubi supra.* The court below having made a general finding, which by the statute has the same effect as the verdict of a jury, the plaintiff in error can resort to no other means of redress than those open to it had the case been tried by a jury and a general verdict rendered."

In the case of Lehmen vs. Dickson, 148 U. S. 71-74, the Supreme Court, repeating the rule established in the case of Flanders vs. Tweed, 9 Wall. 425, said:

> "This court is disposed to hold parties to a reasonably strict conformity to the provisions of the statute prescribing the proceedings in the case of a trial by the court without a jury."

The case of Insurance Company vs. Boon, 95 U. S. 117, was distinguished in the case of Marye vs. Strouse, 5 Fed. 498, wherein the learned judge, in deciding whether or not a general finding could be substituted by special findings, said:

> "The act of March 3, 1865, (Section 649, Rev. St.), allows the finding to be either general or special. If an application for special findings had been made at the trial, it would doubtless have been granted; but I do not see how, consistently with the rules of law governing amendments of judgments and records, such a finding of facts can now be made and filed as part of the record in this case. In cases in which amendments of the record have been permitted, it has been done to supply some defect, and to conform it with the truth or the real intention of the court. But in the present case there is no defect in the record. It speaks the truth, and is exactly that which the court intended it should be.
>
> The general finding of the issues of fact in favor of the plaintiff satisfies the requirements of Section 649, and was made and signed by the judge, and intended to be a general, as distinguished from a special, finding. Here, then, there is no defect, no mistake, no error; 'the record conforms to and exhibits the truth.'' A special finding of facts, if signed and allowed to be filed now, would contradict the record. The judgment of this court was based upon a general, not a special, verdict. There is nothing in this record by which the amendment asked can be made. In the case of Ins. Co. vs. Boon, 95 U. S. 117, there was no technical finding of facts, general or special, and there was therefore a defect in the record.

> The opinion read on the decision, and filed, contained the statement of facts upon which the judgment was based. 'All that was wanting to make it a sufficient special finding,' say the court, 'was that it was not entitled "finding of facts." ' I see nothing in that case to warrant the course asked in this. That was the correction of a defect in the record in conformity to the truth, by the aid of the opinion of the judge; this would be a change of the record not in accordance with, but in contradiction of, the truth. The prayer that special findings of fact he signed and filed *nunc pro tunc*, as of the November term, must be denied."

In this case it is palpable from the very beginning that after the making of the general finding and entry of judgment thereon the plaintiff was out of court, there being no question open to revision by the appellate court.

The making and filing of special findings *nunc pro tunc* on the specification that the Court had intended to make such findings and had so declared itself or manifested such intention, as was done in the case of Ins. Co. vs. Boon, supra, is decidedly erroneous because there was no request for special findings during the progress of the trial and the Court announced its general finding orally and also made a record of it in the journal of the court, which general finding still remains unimpeached and cannot be disregarded. British Queen Mg. Co. vs. Baker Silver Mg. Co., supra. Furthermore, the Court's general finding embodied in its opinion giving its reasons

leading up to its conclusion is made a part of the record and follows the special findings. (Trans. 19.) There was no omission on the part of the Court. The record of the court was full and complete and stated the truth.

It would have been an easy matter for counsel to request the Court to make special findings at the proper time during the progress of the trial. Having failed so to do he relieved the Court of any obligation to make them. This Court has ruled many times that if the parties desire a review of the law they must ask the trial court to make special findings, which obviously means that the request must be made during the progress of the trial, not after the trial ends, which in this case was contemporaneous with the announcing or filing of the general finding. U. S. Fidelity & G. Co. vs. Board of Commissioners, supra. Furthermore the omission to make findings will not be considered in the appellate court in the absence of a request therefor in the court below. Lee Joe Yen vs. U. S., 148 Fed. 682.

This court has also ruled that it is disposed to hold parties to a reasonably strict conformity to the provisions of the statute prescribing the proceedings in the case of a trial by the Court without a jury. Lehmen vs. Dickson, supra. It is apparent, therefore, that the proceedings followed in this case after judgment, without authority of law, cannot be sanctioned.

For the reasons herein given we respectfully ask that the writ of error in this case be dismissed and that the decision of the District Court of the United States for the District of Utah be affirmed.

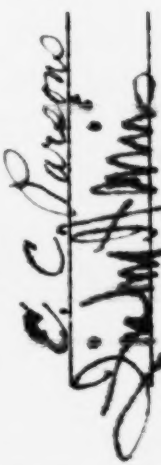
Respectfully submitted,

HARVEY H. CLUFF,
Attorney General of Utah.

WILLIAM A. HILTON,
Assistant Attorney General
of Utah.
Attorneys for Defendant in Error.

J. ROBERT ROBINSON,
W. HAL FARR,
LAWRENCE A. MINER,
of Counsel.

Received copy of the foregoing brief at Salt Lake City, Utah, this 6th day of December, 1922.



Attorneys for Plaintiff
In Error.

No. 321

In the Supreme Court of the United States

October Term, 1922

SOUTH UTAH MINES & SMELTERS,
Plaintiff in Error,

vs.

BEAVER COUNTY,
Defendant in Error.

Motion to Dismiss and Affirm and Notice of Motion to Dismiss and Affirm

In Error to the District Court of the United States for the District of Utah.

HARVEY H. CLUFF,
Attorney General of Utah,
WM. A. HILTON,
Assistant Attorney General of Utah,
Attorneys for Defendant in Error.

J. ROBERT ROBINSON,
W. HAL FARR,
LAWRENCE A. MINER,
of Counsel.

C. C. PARSONS,
FISHER HARRIS,
Attorneys for Plaintiff in Error.

In the Supreme Court of the United States

October Term, 1922

SOUTH UTAH MINES & SMELTERS,
Plaintiff in Error,

vs.

BEAVER COUNTY,
Defendant in Error.

Motion to Dismiss and Affirm

In Error to the District Court of the United States for the District of Utah.

Comes now Beaver County, the defendant in error, by Harvey H. Cluff and William A. Hilton, its counsel, and moves this Court to dismiss the writ of error herein for want of jurisdiction, and because the said writ of error is irregular and insufficient on the following grounds, to-wit:

1. That no exceptions were taken to any ruling of the Court during the progress of the trial.

2. That there is no bill of exceptions.

3. That the case was tried to the Court without a jury on written stipulation of counsel, and there was no request for speciai findlngs and no request for a declaration of the law during the progress of the trial.

4. That there was a general finding made by the Court in favor of the defendant.

5. That judgment was entered on the general finding on November 17th, 1921.

6. That there was no motion in arrest of judgment and no motion for a new trial.

7. That nearly three months after the entry of the judgment on said general finding the District Court, on motion of plaintiff, over the vigorous objection of defendant, made and filed special findings of fact and conclusions of law.

8. That the order of the District Court filed March 9, 1922, nearly four months after entry of judgment on the general finding, does not have the effect of vacating the said general finding, but, on the contrary, the said order is in effect itself a general finding for defendant.

9. That the District Court has made both a general finding and special findings.

and the said defendant in error, by counsel as aforesaid, also moves this Court to affirm the judgment of the District Court of the United States for the District of Utah herein upon the ground that the questions upon which the decision of the cause depends are so frivolous as not to need further argument.

HARVEY H. CLUFF,
Attorney General of Utah,

WM. A. HILTON,
Assistant Attorney General of Utah,
Attorneys for Defendant
in Error.

J. ROBERT ROBINSON,
W. HAL FARR,
LAWRENCE A. MINER,
of Counsel.

Received copy of the foregoing Motion to Dismiss and Affirm at Salt Lake City, Utah, this 29th day of November, 1922.

C. C. PARSONS,
FISHER HARRIS,
Attorneys for Plaintiff in Error.

In the Supreme Court of the United States

October Term, 1922

SOUTH UTAH MINES & SMELTERS,
Plaintiff in Error,

vs.

BEAVER COUNTY,
Defendant in Error.

Notice of Motion to Dismiss and Affirm

In Error to the District Court of the United States for the District of Utah.

You are hereby notified that the motion to dismiss the writ of error and affirm the judgment of the District Court of the United States for the District of Utah, in the above entitled case, will be brought on for hearing

in the above entitled Court on Monday, the 8th day of January, A. D. 1923.

HARVEY H. CLUFF,
Attorney General of Utah,

WM. A. HILTON,
Assistant Attorney General of Utah,
Attorneys for Defendant
in Error.

J. ROBERT ROBINSON,
W. HAL FARR,
LAWRENCE A. MINER,
of Counsel.

Received copy of foregoing notice this 29th day of November, A. D. 1922.

C. C. PARSONS,
FISHER HARRIS,
Attorneys for South Utah Mines
& Smelter, Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

October Term, 1922.

No. 321.

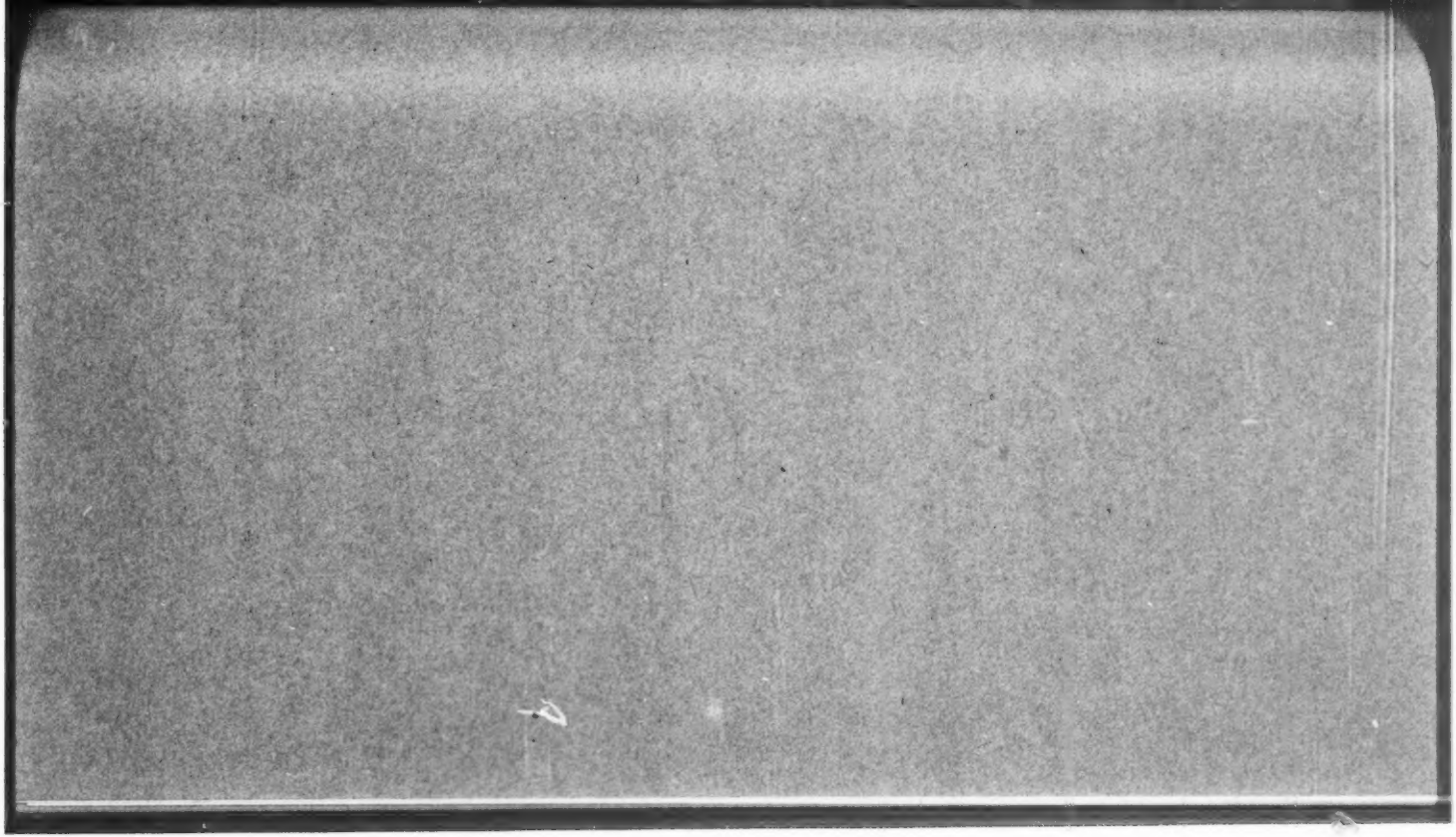
SOUTH UTAH MINES AND SMELTERS,
PLAINTIFF IN ERROR,

vs.

BEAVER COUNTY.

BRIEF OF PLAINTIFF IN ERROR.

C. C. PARSONS,
FISHER HARRIS,
E. O. LEATHERWOOD,
Counsel for Plaintiff in Error.



SUBJECT INDEX.

TABLE OF CASES.

SUPREME COURT OF THE UNITED STATES.

October Term, 1922.

No. 321.

SOUTH UTAH MINES AND SMELTERS,
PLAINTIFF IN ERROR,

vs.

BEAVER COUNTY.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

The plaintiff mining company had for a number of years operated its mine in the vicinity of the town of Newhouse in Beaver County, Utah, on a large scale, hauling ores mined some three miles to its concentrating mill, where, after saving the valuable concentrates, the remaining material was allowed to flow from the mill in the form of tailings and deposited on desert land owned by plaintiff in the vicinity. These tailings were not abandoned. By August 4, 1914, plaintiff's mine had been worked out and it was then closed down, and the plant dismantled. By that date, however, the tailings deposit had grown to

the volume of approximately 900,000 tons, the tailings containing copper and other minerals that had been in quantities too small for profitable extraction by processes known to the mining world during its accumulation. (Tr. 16.)

On January 13, 1914, plaintiff entered into an agreement with a corporation known as Utah Leasing Company (Tr. 5 to 9, incl.), whereby plaintiff was required to and did deliver its tailings deposit to that company. The latter took possession, constructed its reduction works and ultimately removed from that deposit by commercial processes its contents of copper, gold and silver, as provided by that agreement. The consideration paid plaintiff thereunder was 10 per cent of Utah Leasing Company's concentrates. This agreement plaintiff contends was a sale of the tailings deposit to Utah Leasing Company, title passing with delivery of possession on January 13, 1914. During the calendar year 1918, Utah Leasing Company realized from its treatment of this dump net earnings in the sum of $120,547.00, which sum included plaintiff's 10 per cent, and which was the result of a calculation prescribed by statute hereafter to be referred to forming the basis for taxation of mines. (Tr. 17.)

On January 1, 1919, there became effective an amendment to Section 4, Article XIII, Constitution of Utah, whereby Section 4 theretofore as follows:

> "Section 4. (Taxation of Mines.) All mines and mining claims, both placer and rock in place, containing or bearing gold, silver, copper, lead, coal or

other valuable mineral deposits, after purchase thereof from the United States, shall be taxed at the price paid the United States therefor, unless the surface ground, or some part thereof, of such mine or claim, is used for other than mining purposes, and has a separate and independent value for such other purposes; in which case said surface ground, or any part thereof, so used for other than mining purposes, shall be taxed at its value for such other purposes, as provided by law, and all machinery used in mining, and all property and surface improvements upon or appurtenant to mines and mining claims, which have a value separate and independent of such mines or mining claims, and the net annual proceeds of all mines and mining claims, shall be taxed by the State Board of Equalization."

was amended to read as follows:

"Sec. 4. (Taxation of Mines.) All metalliferous mines or mining claims, both placer and rock in place, shall be assessed at $5.00 per acre, and in addition thereto at a value based upon some multiple or submultiple of the net annual proceeds thereof. All other mines or mining claims and other valuable mineral deposits, including lands containing coal or hydrocarbons, shall be assessed at their full value. All machinery used in mining and all property or surface improvements upon or appurtenant to mines or mining claims, and the value of any surface use made of mining claims, or mining property for other than mining purposes, shall be assessed at full value. The state board of equalization shall assess and tax all property herein enumerated, provided that the assessment of $5.00 per acre and the assessment of the value of any use other than for mining purposes shall be made as provided by law."

In an effort to apply the foregoing Constitutional amendment the Legislature of 1919 passed a law made effective March 21, 1919, amending various sections of the

statute relating to taxation of mines, which amendatory act appears as Chapter 114, Laws of Utah, 1919. That portion of the amendment with which we are particularly concerned is Section 5864, in part as follows:

> "All metalliferous mines or mining claims, both placer and rock in place shall be assessed at $5.00 per acre, and in addition thereto at a value determined by taking the multiple of three times the net annual proceeds thereof. All other mines or mining claims and other valuable mineral deposits, including lands containing coal or hydrocarbons, shall be assessed at their full value. All machinery used in mining and all property or surface improvements upon or appurtenant to mines or mining claims, and the value of any surface use made of mining claims or mining property for other than mining purposes, shall be assessed at full value. * * *
>
> "The words 'net annual proceeds' of a metalliferous mine or mining claim as used in this Section are defined to be the net proceeds realized during the preceding calendar year from the sale, or conversion into money, or its equivalent, of all ores from such mine or mining claim extracted by the owner or lessee, contractor or other person working upon or operating the property, during or previous to the year for which the assessment is made, including all dumps and tailings, after making the following and no other deductions from the gross proceeds thereof."

By Section 5929, Compiled Laws of Utah, 1917, as amended by Chapter 114, Laws of Utah, 1919, appearing at page 324 of the latter, it was further provided that:

> "* * * and the owner or owners of all mines and mining claims and other valuable mineral deposits, including lands containing coal or hydrocarbons, other than metalliferous mines, must on or before the second Monday in February in each year,

> furnish to the State Board of Equalization a statement in detail of all lands owned by him or them containing coal, hydrocarbons, or other valuable mineral deposits, other than metalliferous, and describing the same in accordance with the government survey, stating the full value of each mining claim or legal subdivision of forty acres as of the first day of January next preceding * * *"

The trial court found that on January 1, 1919, this tailings deposit was of the value of $20,000.00 and that plaintiff's mine was on August 4, 1914, and at all times since that date had been of no value. (Tr. 16.) However, the State Board of Equalization, over plaintiff's protest, applied the multiple of three to the "net earnings" realized from the treatment of the tailings dump by Utah Leasing Company for the year 1918, and thereby assessed plaintiff's mine for the year 1919 at the sum of $361,641.00. Utah Leasing Company went scot free, the State Board of Equalization concluding that it was bound so to assess this property, because it was provided by Section 5864, supra, as follows:

> "The words 'net annual proceeds' of a metalliferous mine or mining claim as used in this section are defined to be the net proceeds realized during the preceding calendar year from the sale, or conversion into money, or its equivalent, of all ores from such mine or mining claim extracted by the owner or lessee, contractor or other person working upon or operating the property, during or previous to the year for which the assessment is made, including all dumps and tailings, after making the following and no other deductions from the gross proceeds thereof."

Plaintiff paid under protest the taxes levied upon that assessment and this suit was brought to recover the

amount so paid under authority of Sections 6094 and 6095, Compiled Laws of Utah, 1917. The trial court rendered judgment for the defendant, sustaining the assessment. Plaintiff has here assigned errors as follows: (Tr. 23 to 30, incl.):

SPECIFICATION OF ERRORS.

First: The findings of fact are not sufficient to support either the judgment or conclusions of law in that it is found by Finding No. 4 that the tailings dump or deposit therein referred to was in fact neither a mine nor a part of a mine, but instead a thing wholly separate and apart from plaintiff's mine and located some three miles away from said mine, on desert land non-mineral in character, an accumulation of tailings in the form of personal property. Being neither a mine nor part of a mine, that deposit was not taxable as a mine under the constitution or laws of the State of Utah.

Second: The findings of fact are not sufficient to support either the judgment or conclusions of law in that upon the facts found as stated in assignment of error No. First hereof next preceding, said tailings deposit was a "valuable mineral deposit" within the provisions of Section 4, Article XIII, Constitution of Utah, and as such was taxable only at its full value and not at a multiple thereof.

Third: The findings of fact are not sufficient to support either the judgment or conclusions of law in that upon the facts found as stated in assignment of error No. First hereof preceding, said tailings deposit was a

"valuable mineral deposit" within the provisions of Section 5864, Compiled Laws of Utah 1919, and as such was taxable only at its full value and not at a multiple thereof.

Fourth: The findings of fact are not sufficient to support either the judgment or conclusions of law in that it is found by finding No. 6 that on the 13th day of January, 1914, plaintiff and Utah Leasing Company, a corporation, entered into the agreement annexed to plaintiff's complaint as its "Exhibit A," pursuant to which Utah Leasing Company took possession of said tailings deposit and removed therefrom its contents of copper, gold and silver and paid over to plaintiff a stipulated ten per cent royalty. But said agreement constituted a sale of said deposit by plaintiff to Utah Leasing Company and said deposit was no longer assessable as the property of the plaintiff and much less could it lawfully have been made the basis for the assessment of plaintiff's worked out worthless mine.

Fifth: The findings of fact are not sufficient to support either the judgment or conclusions of law in that it is found by finding No. 5 that on the 4th day of August, 1914, plaintiff closed down and ceased to operate its said mine, and that the same has not since been operated by plaintiff or anyone else, wherefore under the constitution and laws of Utah plaintiff's mine was not taxable during any of said years, there being no net proceeds therefrom.

Sixth: The findings of fact are not sufficient to support either the judgment or conclusions of law in that

it is found by finding No. 5 that on the 4th day of August, 1914, all the ores or metalliferous deposits in plaintiff's mine which could be profitably mined therefrom under processes then known had been taken from said mine and at no time since said date could any of the ores or metalliferous deposits left in said mine have been profitably mined therefrom under known processes and said mine has since said date been of no value; and in that by said finding No. 5 it was further found that on January 1, 1919, said tailings deposit was of the value of but $20,000.00, and in that by finding No. 10 it was found that the assessment herein complained of was made against plaintiff's mine and not upon said tailings deposit or dump. But the court by its judgment upheld the assessment of said mine at an assessed value of $361,641.00, which assessment and resulting tax was in violation of Section 3 of Article XIII of the Constitution of Utah, commanding a uniform and equal rate of assessment and taxation on all property in the state according to its value in money and requiring the adoption by the Legislature of such laws as shall secure a just valuation for taxation of all property, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property.

Seventh: The findings of fact are not sufficient to support either the judgment or conclusions of law in that upon the facts found, stated in assignment of error No. Sixth hereof next preceding, and upon the further finding that plaintiff's mine was not in operation, said assessment and tax were in violation of the provisions of

Section 4 of Article XIII of the Constitution of Utah, whereby it is provided that all mines should be assessed at some multiple or sub-multiple of their net annual proceeds, and that all other valuable mineral deposits should be assessed at their full value.

Eighth: The findings of fact are not sufficient to support either the judgment or conclusions of law in that upon the facts found, stated in assignment of error No. Sixth hereof preceding, and upon the further finding that plaintiff's mine was not operated, said assessment and tax were in violation of the provisions of Section 5864, Compiled Laws of Utah 1917, as amended by Chapter 114, Laws of Utah 1919, whereby it is provided that all mines should be assessed at a value determined by multiplying by three the net annual proceeds thereof, and that all other valuable mineral deposits should be assessed at their full value.

Ninth: The findings of fact are not sufficient to support either the judgment or conclusions of law in that it is found by finding No. 6 that in the year 1918 the net earnings realized from the treatment of said tailings deposit amounted to the sum of $120,547.00. Wherefore, in compliance with the constitution and laws of Utah, whereby it is provided that in arriving at the value of mines and mining claims the net annual proceeds derived from the working thereof shall be used as a basis to be multiplied by three, the product to be their value for taxation, said net earnings so derived from said tailings dump were multplied by three and the product of $361,641.00 derived, and over plaintiff's protest applied for assess-

ment as the value of plaintiff's mine. But said assessment so made was with an arbitrary and unlawful disregard of the actual or market value of said mine, and was in violation of that part of Section 1 of the Fourteenth Amendment to the Constitution of the United States wherein it is provided that no state shall deny to any person within its jurisdiction the equal protection of the laws.

Tenth: The findings of fact are not sufficient to support either the judgment or conclusions of law in that upon the facts found, stated in assignment of error No. Ninth hereof next preceding, each Section 4 of Article XIII of the Constitution of Utah, and Section 5864, Compiled Laws of Utah 1919, as interpreted by the court to conform with the conclusions of law and judgment, deny to persons within the state's jurisdiction the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States, for such assessment cannot, save by the remotest accident, if at all, be indicative of the actual value of the property assessed or even approximate such value and thereby impose an equal burden upon the members of the class so taxed.

Eleventh: The findings of fact are not sufficient to support either the judgment or conclusions of law in that upon the facts found stated in assignment of error No. Ninth hereof preceding, said assessment and levy and the enforced payment thereunder were a taking of plaintiff's property without due process of law, in violation

of the Fourteenth Amendment to the Constitution of the United States.

Twelfth: The findings of fact are not sufficient to support either the judgment or conclusions of law in that upon the facts found stated in assignment of error No. Ninth hereof preceding, Section 4 of Article XIII of the Constitution of Utah, and Section 5864, Compiled Laws of Utah, 1917, as amended by Chapter 114, Laws of Utah 1919, as interpreted by the court to conform with said conclusions of law and judgment violate that part of Section 1 of the Fourteenth Amendment to the Constitution of the United States wherein it is provided that no state shall deprive any person of life, liberty or property without due process of law.

Thirteenth: The findings of fact are not sufficient to support either the judgment or conclusions of law in that upon the facts found, stated in assignment of error No. Ninth hereof preceding. Section 5864, Compiled Laws of Utah 1917, as amended by Chapter 114, Laws of Utah 1919, as interpreted by the court to conform with said conclusions of law and judgment, is in violation of Section 3 of Article XIII of the Constitution of Utah.

Fourteenth: The findings of fact are not sufficient to support either the judgment or conclusions of law in that upon the facts found, stated in assignment of error No. Ninth hereof preceding, Section 5864, Compiled Laws of Utah, 1917, as amended by Chapter 114, Laws of Utah, 1919, as interpreted by the court to conform with said conclusions of law and judgment, is in violation of Section 4 of Article XIII of the Constitution of Utah.

Fifteenth: The pleadings are insufficient to support either the judgment or conclusions of law in that it is alleged by plaintiff's paragraph IV of its complaint and admitted by defendant in paragraph 1 of the answer, that the tailings dump or deposit therein referred to was in fact neither a mine nor a part of a mine, but instead a thing wholly separate and apart from plaintiff's mine and located some three miles away from said mine, on desert land non-mineral in character, an accumulation of tailings in the form of personal property. Being neither a mine nor part of a mine that deposit was not taxable as a mine under the Constitution or laws of Utah.

Sixteenth: The pleadings are insufficient to support either the judgment or conclusions of law in that upon the admitted facts stated in assignment of error No. Fifteenth hereof next preceding, said tailings deposit was a "valuable mineral deposit" within the provisions of Section 4, Article XIII, Constitution of Utah, and as such was taxable only at its full value and not at a multiple thereof.

Seventeenth: The pleadings are insufficient to support either the judgment or conclusions of law in that upon the admitted facts, stated in assignment of error No. Fifteenth hereof preceding said tailings deposit was a "valuable mineral deposit" within the provisions of Section 5864, Compiled Laws of Utah, 1917, as amended by Chapter 114, Laws of Utah, 1919, and as such was taxable only at its full value and not at a multiple thereof.

Eighteenth: The pleadings are insufficient to support either the judgment or conclusions of law in that it

is alleged by paragraph VI of plaintiff's complaint and admitted by defendant in paragraph III of its answer that on or about the 13th day of January, 1914, plaintiff and Utah Leasing Company, a corporation, entered into the agreement annexed to plaintiff's complaint as its "Exhibit A," pursuant to which Utah Leasing Company took possession of said tailings deposit and removed therefrom its contents of copper, gold and silver and paid over to plaintiff a stipulated ten per cent royalty. But said agreement constituted a sale of said deposit by plaintiff to said Utah Leasing Company and said deposit was no longer assessable as the property of the plaintiff and much less could it lawfully have been made the basis for the assessment of plaintiff's worked out worthless mine.

Nineteenth: The pleadings are insufficient to support either the judgment or conclusions of law in that it is alleged by paragraph V of plaintiff's complaint and admitted by defendant in paragraph II of its answer that on the 4th day of August, 1914, plaintiff closed down its said mine and ceased to operate the same and that said mine has not since been operated by plaintiff or anyone else. Wherefore, under the Constitution and laws of Utah, plaintiff's mine was not taxable during any of said years, there being no net earnings therefrom.

Twentieth: The pleadings are insufficient to support either the judgment or conclusions of law in that it is alleged by paragraph VII of plaintiff's complaint, and admitted by defendant in paragraphs II, III and IV of its answer that the taxing authorities of the State of Utah

in their assessment of plaintiff's mine for the year 1919 attempted to adapt the provisions of Section 5864, Compiled Laws of Utah, 1917, as amended and appearing as Section 5864 in Chapter 114, Laws of Utah, 1919, to the operations of said Utah Leasing Company and found that the so-called "net annual proceeds" derived from the treatment of said tailings dump had amounted to the sum of $120,547.00, for the year 1918; that said taxing authorities thereupon applied to said sum of $120,547.00 the multiple of three, prescribed by said section as amended, and arrived at the sum of $361, 641.00, which last named sum the taxing authorities found to be the value of plaintiff's said mine for the purpose of assessment for the year 1919. But the court by its judgment upheld the said assessment of said mine at the assessed value of $361,-641.00, which assessment and resulting tax were in violation of Section 3 of Article XIII of the Constitution of Utah, commanding a uniform and equal rate of assessment and taxation on all property in the state, according to its value in money and requiring the adoption by the legislature of such laws as shall secure a just valuation for taxation of all property, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property.

Twenty-first: The pleadings are insufficient to support either the judgment or conclusions of law in that upon the admitted facts stated in the assignment of error No. Twentieth hereof next preceding and by reason of the further admission occurring in paragraph II of defendant's answer to the effect that plaintiff's mine was

closed down on the 4th day of August, 1914, and had not since been operated by anyone, said assessment and tax were in violation of the provisions of Section 4 of Article XIII of the Constitution of Utah, whereby it is provided that all mines shall be assessed at some multiple or submultiple of their net annual proceeds and that all other valuable mineral deposits should be assessed at their full value.

Twenty-second: The pleadings are insufficient to support either the judgment or conclusions of law in that upon the admitted facts, stated in assignment of error No. Twentieth hereof preceding and the further admission occurring in paragraph II of defendant's answer to the effect that plaintiff's mine was closed down and not operated, said assessment and tax were in violation of the provisions of Section 5864, Compiled Laws of Utah, 1919.

Twenty-third: The pleadings are insufficient to support either the judgment or conclusions of law in that upon the admitted facts stated in assignment of error No. Twentieth hereof preceding, said assessment of plaintiff's mine was made with an arbitrary and unlawful disregard of the actual or market value of said mine in violation of that part of Section 1 of the Fourteenth Amendment to the Constitution of the United States, wherein it is provided that no state shall deny to any person within its jurisdiction the equal protection of the laws.

Twenty-fourth: The pleadings are insufficient to support either the judgment or conclusions of law in that upon the admitted facts stated in assignment of error No.

Twentieth hereof preceding, each Section 4 of Article XIII of the Constitution of Utah and Section 5864, Compiled Laws of Utah, 1917, as amended by Chapter 114, Laws of Utah, 1919, as interpreted by the court to conform with the conclusions of law and judgment, deny to persons within the state's jurisdiction the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States, for such assessment cannot, save by the remotest accident, if at all, be indicative of the actual value of the property assessed or even approximate such value and thereby impose an equal burden upon the members of the class so taxed.

Twenty-fifth: The pleadings are insufficient to support either the judgment or conclusions of law in that upon the admitted facts stated in assignment of error No. Twentieth hereof preceding said assessment and levy and the enforced payment thereunder were a taking of plaintiff's property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

Twenty-sixth: The pleadings are insufficient to support either the judgment or conclusions of law in that upon the admitted facts stated in assignment of error No. Twentieth hereof preceding, Section 4 of Article XIII of the Constitution of Utah and Section 5864, Compiled Laws of Utah, 1917, as amended by Chapter 114, Laws of Utah, 1919, as interpreted by the court to conform with the said conclusions of law and judgment, violate that part of Section 1 of the Fourteenth Amendment to the

Constitution of the United States, wherein it is provided that no state shall deprive any person of life, liberty or property without due process of law.

Twenty-seventh: The pleadings are insufficient to support either the judgment or conclusions of law in that upon the admitted facts stated in assignment of error No. Twentieth hereof preceding, Section 5864, Compiled Laws of Utah, 1917, as amended by Chapter 114, Laws of Utah, 1919, as interpreted by the court to conform with said conclusions of law and judgment, is in violation of Section 3 of Article XIII of the Constitution of Utah.

Twenty-eighth: The pleadings are insufficient to support either the judgment or conclusions of law in that upon the admitted facts stated in assignment of error No. Twentieth hereof preceding, Section 5864, Compiled Laws of Utah, 1917, as amended by Chapter 114, Laws of Utah, 1919, as interpreted by the court to conform with said conclusions of law and judgment, is in violation of Section 4 of Article XIII of the Constitution of Utah.

Twenty-ninth: The court erred in rendering judgment in favor of the defendant and against the plaintiff.

ARGUMENT.

I.

Point.

The tailings deposit or dump was not a mine nor was plaintiff's non-producing, worked-out property a mine within the provisions of Constitution or Statute, supra, and the assessment therefore as such was without authority of law and void.

(Assignments of Error Nos. First, Second, Third,

Fifth, Seventh, Eighth, Fourteenth, Fifteenth, Sixteenth, Seventeenth, Nineteenth, Twenty-first, Twenty-second and Twenty-eighth.)

The tailings dump was not a mine.

This court held in the case of Forbes v. Gracey, 94 U. S. 762, 24 U. S. (L. ed.) 313, that:

> "The moment this ore becomes detached from the soil in which it is embedded it becomes personal property, the ownership of which is in the man whose labor, capital and skill has discovered and developed the mine and extracted the ore or other mineral product. It is then * * * subject to taxation by the state as any other personal property is."

And such is generally the law upon the subject.

18 R. C. L., Sec. 88, p. 1179;

Barringer & Adams "The Law of Mines and Mining in the United States, p. 5;

Shamel "Mining, Mineral and Geological Law," p. 32.

In the case of Coal Company v. Railroad Company, 187 Pa. 145, 41 Atl. 37, the court held:

> "The culm was personal property. It had been mined from its original place, and though it rested upon the land, it was as completely severed as a kiln of bricks in a brick yard, or a pile of pig iron in a foundry. * * * The learned judge below stated the rights of plaintiff very clearly and accurately in the following language: 'This material (coal) had been mined and placed upon the surface by the plaintiff, and was personal property of the latter, although mixed with the dirt and slate. The defendant took it directly and occupied it for a roadbed and entirely deprived the plaintiff of its property therein. * * *'"

To the same effect:

Green v. Ashland Iron Company, 62 Pa. 97;
Byers v. Byers, 183 Pa. 509, 38 Atl. 1027, 39 L. R. A. 537, 63 Am. St. Rep. 765.

We have never heard of a mine in personal property. That a mine is real property can scarcely be subject to argument. Barringer & Adams The Law of Mines and Mining in the United States, pp. 747 to 750, both first and second editions. This tailings deposit was not rock in place, nor was it a placer—no more placer than "a pile of pig iron in a foundry."

The tailings dump had not been abandoned and allowed to become an accretion to the public domain. On the contrary it had been deposited on desert land owned by the plaintiff and there retained and had been sold on January 13, 1914, and delivered by plaintiff to a third party separate and apart from the soil. (Tr. 17 and 5 to 9, incl.) One could assert with the same propriety that the copper secured from plaintiff's property before 1914 that had found its way into cornices and roofs of buildings, the electrical lines and equipment of utilities, and whatnot, was still a mine. Defendant fails to admit the distinction between a mine, or "part of a mine" and the product of a mine. We will freely admit that the tailings deposit was a product of the mine, but deny that it was a mine or part of a mine in fact or within the meaning of the tax laws in question.

Nor was plaintiff's non-producing, worked-out mine a mine within the revenue provisions of constitution or statute of Utah.

The trial court found:

"That on the 4th day of August, 1914, plaintiff closed down and ceased to operate its said mine, and the same as distinguished from the tailings deposit or dump has not since been operated by plaintiff or anyone else. That on said 4th day of August, 1914, all the ores or metalliferous deposits in said mine which could be profitably mined therefrom under processes then known had been taken from said mine and at no time since said date could any of the ores or metalliferous deposits left in said mine have been profitably mined therefrom under known processes, and said mine, as distinguished from said tailings deposit or dump, has since said date been of no value." (Tr. 16, Finding No. 5.)

That property was not a mine within any definition of the word. As said by the court in J. M. Guffey Petroleum Company v. Murrel, 127 La. 466, 53 So. 705:

"When the term 'mine' is used it is generally understood that the excavation so named is in actual course of exploitation; otherwise some qualifying term like 'abandoned' is required."

Plaintiff's property was certainly not a mine in the sense in which the word is used in the revenue laws of Utah, to be taxed at a multiple of its net proceeds. At no time since the present law was in effect was it even potentially a mine. It was incapable of net proceeds, was known to contain nothing from which net proceeds could be produced.

The provision of the Montana Constitution relating to mine taxation was construed by the Supreme Court of Montana in the case of Northern Pacific Railway Co. v. Musselshell County, 169 Pac. 53, and that constitutional provision was identical with Section 4, Article XIII, Constitution of Utah, before its amendment, supra. The

court referred to Northern Pacific Railway Co. v. Mjelde, 48 Mont. 287, 137 Pac. 386, and said:

> "It was held * * * that the term 'mine' means a mining property so developed as to yield, or to be capable of yielding a profit. The term 'mine' was thus construed as broad enough to include within its scope and meaning any developed and producing body of ore, without reference to how the title to the land in which it is found has been acquired. The language employed in this connection is the following:
>
> "'* * * We decline to believe that they used the word 'mine' in Section 3 in a sense which would include hidden, unknown, or undeveloped deposits of ore or coal. In that section they spoke with reference to revenue and referred to something which would or might produce revenue in its present state of development.'"

The tailings were accumulated between the years 1903 and 1914; the mine was exhausted and closed down in 1914; both dump and mine had responded in full to the payment of all taxes levied thereupon; when closed down the status of this property as a mine ceased and that status has never been resumed.

The assessment, therefore, was without authority of law and void.

Section 4, Article XIII, Constitution of Utah, as amended, provides:

> "All metalliferous mines or mining claims, both placer and rock in place, shall be assessed at * * * a value based upon some multiple or sub-multiple of the net annual proceeds thereof. All other mines or mining claims and other valuable mineral deposits, including lands containing coal or hydro-carbons, shall be assessed at their full value."

Some meaning was, of course, intended by the re-

quirement that "all other mines or mining claims and other valuable mineral deposits * * * shall be assessed at their full value." As we interpret this provision the tailings deposit, not being a metalliferous mine, should have been assessed as "other valuable mineral deposits," i. e., at its full value and not at a multiple thereof.

Section 5864, Compiled Laws of Utah, 1917, as amended by Chapter 114, Laws of Utah, 1919, as will be noted from the quotations already made, is substantially the same as Section 4, Article XIII, of the Constitution, the Legislature, however, adding the following paragraph:

> "The words 'net annual proceeds' of a metalliferous mine or mining claim as used in this section are defined to be the net proceeds realized during the preceding calendar year from the sale, or conversion into money, or its equivalent, of all ores from such mine or mining claim extracted by the owner or lessee, contractor or other person working upon or operating the property, during or previous to the year for which the assessment is made, including all dumps and tailing, after making the following and no other deductions from the gross proceeds thereof."

The taxing authorities interpreted this inclusion of "all dumps and tailing" as by legislative enactment making them "metalliferous mines" within the definition of the Constitutional provision, regardless of the existence of a mine in fact. Had the dump here involved been hauled from Nevada and deposited at Newhouse, although there were no mine in Utah from which it came, still under the interpretation of the statute by the taxing authorities, that dump could legally be taxed only as "a metalliferous

mine" within the Constitutional provision. Consistent with this interpretation the state concluded that it was a matter of no consequence that plaintiff's so-called mine had been closed down and worked out five years before the Constitutional provision and statute went into effect and was on and prior to January 1, 1919, as well as subsequent thereto a mere barren hillside. For the purpose of this discussion we might just as well ignore the existence of the property once a mine from which these tailings came, for as the state interprets and applies this law that fact is quite irrelevant—the dump by the state's interpretation being the mine. If the statute's inclusion of "all dumps and tailing" is to be given that interpretation, then all that may be said is that the Legislature has exceeded its authority and included among "metalliferous mines" to be subjected to the multiple of three, deposits not within the Constitutional classification and that statute to the extent of such inclusion is in violation of Section 4, Article XIII, Constitution of Utah, and the assessment is, therefore, void.

The trial court concluded as a matter of law that the "tailings deposit or dump was a part of plaintiff's mine and continued to be such until its metal content had been removed and as such was assessable for purposes of taxation at a value represented by three times the net proceeds thereof * * *." (Tr. 18, Conclusion of Law No. 4, and Tr. 19, Court's opinion.) The trial court felt compelled to this conclusion by Mammoth Mining Co. v. Juab County, 51 Utah 316, 170 Pac. 78. That case was decided before the adoption of the tax laws with which we are con-

cerned and it relates to the old law then in effect whereby net proceeds derived from mines were taxed, the mines themselves being exempt. (See Sec. 4, Art. XIII, Constitution of Utah before amendment quoted herein at page .....) In that case both sides apparently conceded the propriety of taxing only the net proceeds from a mine dump. The sole issue being a matter of costs to be charged against the gross in arriving at the net annual proceeds. In our case the court below evidently concluded that if net proceeds from a dump were taxable under the old law, the dump must have been a mine or part of the mine within the meaning of that law and the same words used in the present law should be given an effect whereby the multiple would be applied and the product be the value of the mine, the court doubting the constitutionality of this proceeding because it knew and found as a fact that the mine was without value. In the Mammoth case, however, the court did not declare the dump a mine. It concluded that it made no "difference whether the ores are obtained from the mine or from a dump, if in fact they were at some time taken from the mine," or in other words, that the dump itself was a product of the mine or proceeds from the mine, the further refinement of which would still leave the product proceeds from the mine and taxable as such. No court in Utah nor elsewhere to our knowledge has held a dump to be a mine and as the Constitution of Utah limits the application of a multiple to the valuation of "metalliferous mines," the inclusion of a dump within that definition is without precedent or authority. The two laws are so wholly

different in theory and purpose that an interpretation of the language used in the one cannot be authoritatively applied to the other. The fact is that a dump is neither a mine or part of a mine for purposes of taxation or otherwise. Automobiles are a product of a factory and may be assessed as such. But if the law were to require the assessment of the factory for any given year at a multiple of such product of the year preceding and the factory had burned down or been destroyed prior to the year of the assessment, it would seem reasonable to suppose no factory would be assessed for that year—there was no factory—and still the automobiles remained "a product of the factory."

II.

Point.

The agreement of January 13, 1914, between plaintiff in error and Utah Leasing Company accomplished at that date the sale to the latter of the tailings deposit.

(Assignments of Error Nos. Fourth and Eighteenth.)

The agreement of January 13, 1914, between plaintiff in error and Utah Leasing Company (Tr. 5 to 9, incl., and 17) effected: (a) The immediate delivery of the tailings deposit to Utah Leasing Company; (b) the grant to Utah Leasing Company of the sole and exclusive right (and duty on penalty of forfeiture) to remove from that deposit the mineral content thereof and in its own way to work that dump to its exhaustion; (c) the right in Utah Leasing Company to adopt any process it saw fit in its treatment of that deposit, but at Utah Leas-

ing Company's expense and by means of reduction works to be owned and erected by the latter; (d) the surrender by plaintiff in error of any right, title or interest in the deposit, either of supervision or otherwise, except in the event of a forfeiture upon Utah Leasing Company's default; (e) imposed upon Utah Leasing Company the burden of paying plaintiff in error the stipulated consideration, i. e., 10 per cent of Utah Leasing Company's concentrates of not less than a specified minimum in copper content. That agreement, it is our contention, was a sale. Performance could result only in the consumption of the dump and that occurred in less than one-half the time allowed by the agreement.

The case of Plummer v. Hillside Coal & Iron Co., 104 Fed. 208, decided by the Circuit Court of Appeals for the Third Circuit, had to do with a so-called lease described by the court as follows:

> "The lease was for the term of one hundred years in consideration, inter alia, of the payment of the sum of two hundred dollars, an annual rent of one dollar payable October 1st in each and every year, and the further sum of one hundred dollars 'in case the coal on the leased premises shall prove extensive and abundant and of an average thickness of ten feet.' The more material of the remaining stipulations in the lease are as follows:
>
> " 'It being, however, clearly understood that the possession which the said Thomas acquires under this lease shall extend only to the use of the leased premises as a coal field, that is to say, Thomas shall have full right, power and possession to search for coal anywhere on the leased premises in any manner he may think proper, to raise the coal when found from the beds, at all times to enter and carry away

the coal in wagons, sleds or other vehicles, and to sell the same for his own benefit and profit, and also that he shall have the right to occupy whatever land may be useful or necessary as coal yards; these rights and privileges shall extend to the heirs, executors, administrators and assigns of the said Thomas during the term aforesaid and also to his and their agents, engineers, laborers, and workmen. * * * It is also agreed that the said Samuel or his heirs, so long as they reside on the leased premises, shall have a right to dig whatever coal they may want for their own use, but not to sell so to interfere with the works of said lessees.' "

That lease the court held to have "operated as a sale of coal with the right of removal within one hundred years," and quoted with approval from certain decisions as follows:

"In Plummer v. Iron Co., 160 Pa. St. 483, 28 Atl. 853 * * * the court said:

"'The right of removal was to be exercised within one hundred years. The fact that the instrument is in the form of a lease is not material when the character of the transaction is apparent. * * * A written contract, though not under seal, granting the privilege of digging all the coal or ore on the vendor's land, is equivalent to a conveyance of the title to the coal or ore in fee. * * * Such a conveyance operates to sever the surface from the underlying stratum of coal.' * * *

"In Kingsley v. Iron Co., 144 Pa. St. 613, 23 Atl. 250, * * * the same doctrine was laid down, the court * * * saying:

"'Where a fair interpretation of the written agreement shows that a sale was intended by the parties, and a right to mine and remove all the coal is conferred by it, in express terms or by plain and necessary implication, it will constitute a sale, notwithstanding a term is created within which the coal is

to be taken out. We hold that the writings in this case constitute a sale of the coal to be mined within the terms stated therein.' "

In McMullen v. Blecker, 64 W. Va. 88, 60 S. E. 1093, 131 Am. St. Rep. 894, the owner of certain lands leased to another all of the coal thereunder in consideration of a royalty of five cents per ton, and thereby it was mutually agreed that in the event lessee failed to mine as much as 20,000 tons annually the lessee should pay the lessor $100.00 for each year of such failure, and in default of such payment the lease should be void. The lessor applied for a partition of the lands so leased. The court held:

"The lease has never been forfeited by any act of the lessor or his heirs, if for any cause it could have been. No part of the coal could be set off in kind to the plaintiff or defendant and operated independently of the company. So long as the right of the company to take the coal under the lease subsists, the only rights of the lessor or his heirs, or of McMullen as grantee, is to have the royalty—a simple money demand. The lessee has the right to mine the coal to exhaustion, taking the very substance of the thing sought to be partitioned. * * *

"It is true, as a general rule, that a subsisting lease on land, though material in determining whether partition should be in kind or by sale, is no defense to partition thereof. * * * Nevertheless, when the thing sought to be partitioned has been in effect, as in this case, sold, though subject to be reinvested for breach of a condition, there is nothing upon which partition could operate until the happening of the event which would reinvest title."

There can hardly be a clearer statement of the law than that contained in Delaware & H. Canal Co. v.

Hughes, 183 Pa. 66, 38 Atl. 568, 63 A. S. R. 743, 38 L. R. A. 826, wherein the court said:

> "If the owner grants to another the right or privilege of taking coal from his lands, this grant, if not an exclusive one, is not the grant of an interest in the land, but of an easement or incorporeal right, which leaves the title to the coal in place remaining in the grantor. But a grant of all the coal, or of the exclusive right to mine the coal, is a sale of the coal in place. The conveyance of the coal creates in the vendee an interest in land."

See also Wolfe County v. Beckett, 127 Ky. 252, 105 S. W. 447, wherein one question was whether property held under an oil and gas lease were taxable to the lessee under statutes providing for the taxation of real and personal property within the state. The court held:

> "It is contended, however, that the oil in situ, being a part of the realty cannot be severed therefrom except by deed. It is admitted that the lease held by appellees are of the usual kind. They give to appellees the right to drill and operate for oil and gas for a definite term of years, and, in case oil or gas is found in paying quantities, to continue said operations so long as same is found in quantities that pay. Appellees agree, on their part, to deliver one-eighth of all oil found by reason of such operations in suitable pipe lines to the owner of the fee, the lessor, and to pay a fixed sum per year for each well, the product of which is carried and marketed from the premises. The remainder of the oil or gas is the property of the lessee. Why, then, say that a deed is necessary to sever the oil from the realty, when the lease accomplishes the same results? During the continuance of the lease, the ownership of the oil or gas is vested in the lessee; and, as the lease continues so long as oil or gas may be found in paying quantities, does

not the lessor part with his title to the oil in situ for all practical purposes, for the reason that it has no value if it cannot be produced in quantities that pay. We therefore conclude that the form of contract is immaterial, and that it makes no difference whether the oil or gas privileges be conveyed by deed or lease, just so the effect of the instrument is to vest in the lessee all property rights to the oil or gas that may be found in paying quantities on the leased premises. * * *

"Having held that oil or gas privileges held by lease or otherwise, or any interest therein, are taxable it remains to be determined how the tax on such property shall be apportioned between the lessor and lessee. This court in Mt. Sterling Coal & Gas Co. v. Ratliff, 31 Ky. L. Rep. 1229, 104 S. W. 993, recently laid down the rule that the lessor or owner, who, by the terms of the lease received one-sixteenth of the oil produced from the leased premises, should pay taxes to that extent; and that it was immaterial by what name such property was called—whether personal property, a chattel real, incorporeal hereditament, or privilege. * * *"

In Graciosa Oil Co. v. Santa Barbara County, 155 Cal. 140, 99 Pac. 483, 20 L. R. A. (NS) 211, the California Supreme Court dealt with an oil lease for a term of twenty years and the question was whether or not it should be taxed separately to its owner instead of to the lessor as owner of the fee and be included therein. Even as to a contract of that kind, lacking so many of the elements of immediate delivery and sale characterizing plaintiff's transaction with the Leasing Company, the court held:

"The whole object of the contract is to the effect if not technically a sale and conveyance of a substantial and specific part of the land, at least a dis-

position and transfer thereof to another. It can be easily seen that the reasons for the rule applicable to ordinary leases for the use only that the entire estate should be assessed to the lessor are entirely lacking here, and that it would be a more just and reasonable adjustment of the burden of taxation of such oil leases to assess each party separately with the value of his right or estate in the land. * * *

"The Political Code declares that all property must be assessed to the owner thereof. Sec. 3628. It must be conceded that the rights and privileges of the plaintiff under this lease are private property, and are taxable in some form. Const., Art. 13, Sec. 1. The property rights thus vested in plaintiff belong to it, and not to its lessor. It cannot with good reason be contended that the value of the lessor's estate, including the value of the right to the royalty in the oil produced, embraces, covers, or represents the value of the plaintiff's rights and priveleges in the land, as in the case of the lessor in an ordinary lease. It would seem to follow necessarily that the mining rights and privileges of the plaintiff should be separately assessed to it as the owner."

"Other valuable mineral deposits," as well as property generally in the State of Utah must be assessed at their full value as of the 1st day of January in each year. Sec. 5929, Compiled Laws of Utah, 1917, as amended by Chapter 114, Laws of Utah, 1919, supra. Also Sec. 5876, Compiled Laws of Utah, 1917. The trial court found the value of that dump upon the 1st day of January, 1919, to be the sum of $20,000.00. (Tr. 16, Finding No. 5.) Plaintiff's interest was similar to a money demand by way of a 10 per cent royalty and upon that interest plaintiff should have been assessed for the year 1919, instead of upon the sum of $361,641.00.

III.

Point.

If the tailings deposit or dump be a "metalliferous mine," within the meaning of Section 4, Article XIII of the Constitution of Utah, and if such dump, or the mine from which it originally came, be assessed for taxation at the product of such "net annual proceeds" by three, then Section 4, Article XIII of the Constitution of Utah, as well as Sections 5864 and 5929, Compiled Laws of Utah, 1917, as amended by Chapter 114, Laws of Utah, 1919, violate that part of Section 1 of the 14th Amendment to the Constitution of the United States, wherein it is provided that no state shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

(Assignments of Error Nos. Sixth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth, Twentieth, Twenty-third, Twenty-fourth, Twenty-fifth, Twenty-sixth, Twenty-seventh and Twenty-ninth.)

It is conceivable that for the purpose of taxation mines may be made to constitute a class, the sole justification for which would be the inherent difficulty in valuing them, but to the members of this class a rule must be applied calculated to insure the nearest approach reasonably possible to their accurate valuation. The state may not value a mine for assessment in proportion to the number of people residing in the county of its location, or in proportion to the miles of railroad in its county, or in proportion to the number or value of miners' residences upon its mining claims, or if the mine had been worked out and in years past had been platted into town lots, blocks, streets and alleys, severally owned and occupied as part of a townsite, the value thereof may not

be determined for assessment by applying a multiple to the proceeds from some old slag dump or tailings deposit long ago produced from that mine, nor may such a classification be justified by confining the class to lands, title to which originally passed from the government as mineral lands or by mining patent. And, so in this case, the value of this property, at the time of its assessment a barren hillside, cannot be determined by multiplying by three the proceeds of a dump long ago produced from its operations. The obvious reason, as this court has taught us, is that none of these rules bear any relation to the thing sought to be accomplished, namely, the valuation of the mine or the property that at one time had been a mine. It is here an adjudicated fact that the so-called mine is worthless, having been worked out and exhausted and was so without value at the time of its assessment and during at least some five years before the revenue laws in question were passed, than which more would not seem required to condemn the rule—it bore no relation to the value of the abandoned mine. The trial court found as a fact that that rule was responsible for an assessed valuation of nearly $400,000.00 upon a property found to have then been valueless.

Raymond v. Chicago Union T. Co., 207 U. S. 20, 52 L. ed. 78 at 81, 87, 88, 28 Sup. Ct. 7;

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 155, 41 L. ed. 666 at 668, 669, 670;

County of Santa Clara v. Southern Pac. R. Co., 18 Fed. 385 at 396, 397, 398, 399,

affirmed by this court in 118 U. S. 394, 30 L. ed. 118, 6 Sup. Ct. 1132;

Railroad and Telephone Cos. v. Board of Equalizers, 85 Fed. 302 at 317, 318;

Nashville, C. & St. L. Ry. v. Taylor, 86 Fed. 168 at 185, 186, 187;

Chicago Union Traction Co. v. State Board of Equalization, 114 Fed. 557, 565, 566;

Pilgrim Consolidated Mng. Co. v. Bd. of Commissioners, 76 Pac. 364;

The Railroad Tax Cases, 13 Fed. 722, at 730, 731, 733, 734, 735;

Michigan Telephone Tax Cases, 185 Fed. 634 at 638.

The multiple of three is a fixed and arbitrary multiple which, when applied to the net proceeds of a mine, obtains a result only in rare instances and purely by accident, approximating the true value of the mine taxed. A great copper mine, we will say, worth a hundred million dollars on January 1st, 1922, was valued for assessment at nothing, because the copper market had necessitated a suspension of its operations and no net earnings were had during the preceding year. Another, a silver mine, because able to market its product produced net earnings of $100,000.00 for the year 1921 and was therefore assessed at $300,000.00. Another silver mine is operated by lease to terminate on January 1st, 1922, and the lessees anxiously clean up every particle of commercial ore in the mine, leaving it denuded of all commercial value on January 1st, 1922. In the course of the lessees' operations this mine yields net proceeds amounting to $100,-

000.00, but the property had been worked out, no longer valuable, but was nevertheless arbitrarily given this ficticious assessed value of $300,000.00 for the year 1922. Still another situation arises, that of the plaintiff in error here. Result—a property of enormous value pays no tax; an operating property may pay taxes large or small dependent upon the extent of its operations, wholly without regard to its real value; a property long since a thing of the past, of no value, present or prospective, may be made the object of a fictitiously imposed "value" for assessment of some huge sum, such as the $400,000.00, in round numbers imposed upon the property of this plaintiff.

There can be no equality between the members of the class where the most valuable of all escapes without assessment, another is valued at three times its net proceeds, whereas its actual value is twenty times such net proceeds, another ten times, and another had found its ore bodies exhausted by the year's extraction but still taxed by the multiple of three applied thereto, and another not worth the amount of the tax levied upon the fictitious value. Certainly no equality can exist as to those properties no longer mines at all, but like that of plaintiff in error shut down, worked out and long since possessing no value whatever. Particularly is there no equality where such last named mining companies had parted with the dump being treated, and the dump itself escapes taxation. That these inequalities must result systematically as between the members of the class within the rule, seems to us perfectly apparent upon the face

of both constitution and statute. The law can operate in no other way.

The constitutional guarantee of uniformity and equality in taxation is violated by the application of an arbitrary and inflexible standard of value for assessment that precludes a valuation in fact and prevents the assessing officers from exercising their judgment and knowledge upon it. Such a law is unconstitutional as violative of the due process and equal protection clauses of Section 1 of the 14th Amendment to the Constitution of the United States.

See State v. Railroad Corporations, 4 S. C. 376, where the statute required every railroad company in the state to pay a tax conformable in amount to the length of its road. The court held such tax was void, because not raised upon the value of the property.

And Atlantic & N. C. R. R. Co. v. Board of Commissioners of Carteret County, 75 N. C. 474. The state constitution provided that all property, real and personal, should be taxed by a uniform rule, "according to its true value in money." The statute provided that the road bed of railroads within the state should be assessed at a value not less than $8,000.00 per mile. The court held: "Now, if the legislature were to exact that every man's land shall be valued at $8.00 per acre without regard to its real value, its conflict with the constitution would be manifest and so if it is provided that no man's land should be valued at less than $8.00 per acre, although it be worth much less." Wherefore the statute was held to be unconstitutional.

To the same effect see Board for Assessment of Property v. Alabama Central R. Co., 59 Ala. 551.

And Hawkins v. Mangrum, 78 Miss. 97, 28 So. 872, where the legislature had attempted to classify all lands in the state according to equality, and to assess all lands within each class at a certain respective value per acre. The court held:

> "Having thus determined the general appropriate class of lands according to equality, the class, and not the very value of the specfiic lands, determines the value for taxation * * * It is difficult to see how taxation can be 'equal and uniform' when lands within two miles of the town are taxed at their 'real' value and those of two and a quarter miles are dumped into a general class with an arbitrary, maximum and minimum valuation. The valuation must be actual, not artificial; by particulars, not by groups."

And McCurdy v. Prugh, 59 Ohio St. 465, 55 N. E. 154, where the statute provided for the taxation of credits as follows: "Every credit for a sum certain * * * shall be valued at the full amount of the sum so payable." The court construed the act as requiring the taxation of such credits at their face value regardless of their actual value, and continued: "The legislature no more has power to prescribe an arbitrary and fixed value for this species of property than it has in respect to any other class. As well might it attempt to declare that, without regard to its actual value every horse shall be valued for taxation at $100.00 and every cow at $1.00." And we might add "proclaim the cow a horse and tax it so."

And Williams v. State Board of Assessors, 51 N. J.

L. 512, 18 Atl. 750, wherein the legislature attempted to put an arbitrary valuation upon railroad right of way, commenting upon which section the court said:

> "It is impossible to vindicate the constitutionality of this section * * * The property so taxed would be assessed not according to its own true value, but according to the true value of some other property. Such a tax the legislature cannot sanction. This attempt of the legislature to substitute for the 'the true value' of railroad property the assessed value of the real estate of persons other than railroad or canal corporations as a correct standard of value for railroad property is unconstitutional and must fail."

As we understand the law, to determine the value of a mine by applying a multiple of three to the value of some other property is an artificial, inflexible and arbitrary standard of valuation. There can be no uniformity between the members of the class whose property shall be so valued. Lacking such uniformity, not only the state statute, but constitutional provision, if the defendant's interpretation be correct, is violative of the due process and equal protection clauses of the 14th Amendment to the Constitution of the United States.

Defendant contended below that "dumps and tailings" were mines or parts of mines and at the same time asserted that had the tailings deposit in question been hauled a few miles further and into Nevada and there treated after the exhaustion of the mine in Utah, nevertheless the net earnings therefrom should be determined and multiplied by three to arrive at the assessment of the exhausted mine in Utah. The latter theory would indicate that the dump was no part of the mine, but served

merely to supply a multiplicand whereby to determine the so-called value of the mine in Utah. Utah may not tax property the situs of which is in Nevada. Nor could Nevada be denied the right to tax a tailings deposit situated there, although originating from Utah mines. Upon this theory Nevada would tax the dump and Utah the abandoned mine at three times the dump's net proceeds, not a constitutional procedure yet no more objectionable than that actually adopted by the taxing authorities in this case. Upon this theory also were the mine in Nevada and the tailings had been hauled to and deposited at Newhouse in Utah and there treated, that deposit would not be subject to taxation at all in Utah, a conclusion no one familiar with the state's practice in matters of taxation would accept. Indeed that dump should be taxed in Utah. Section 3, Article XIII, Constitution of Utah, provides as follows:

> "The legislature shall provide by law a uniform and equal rate of assessment and taxation on all property in the state, according to its value in money, and shall prescribe by general law such regulations as shall secure a just valuation for taxation of all property, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property."

Similarly were the mine upon a mere mineral location title to which after its exhaustion had reverted to the government, but the tailings had been deposited upon patented lands, would the state then tax the dump? If so, how? It could not then assess the mine.

In cases of this kind the state, in our opinion, should

tax the dump at its full value on the ground that the dump were a "valuable mineral deposit" within the meaning of the statute and constitution, or that it were other property simply, likewise taxable at its full value under the laws of Utah. But this dump must be allowed some stability in its characteristics—it may not be a "metalliferous mine" within the statute's definition upon one occasion, a "valuable mineral deposit" upon another, and just ordinary property upon still another, and be assessed with or without the multiple applied, as might be dictated by the state's convenience at the time. There can be no equality in the burden imposed upon the members of the class where the rule possesses so many variables.

If the net proceeds from the dump serve merely to supply a multiplicand for the mine's assessment, the net proceeds from the dumps and tailings wherever situated and by whomsoever produced or owned must be ascertained and their product by three be accepted as the value of the mine for assessment. Neither the geographical location of the dump nor the ownership thereof may be permitted to determine which property of the class shall be taxed and which not, for neither the geographical location of the dump or its ownership bear any relation to the value of the mine. To the slag deposits of smelters must be traced ores from Utah mines, for dumps are frequently of slag, and these, as well as tailings, as all men know, are frequently worked over for extraction of mineral not removed in years past, either for want of market or because processes were not then known suited to their commercial extraction. To segregate from these slag

dumps the portion produced from the mines of the state would be impossible, yet the statute includes "all dumps and tailing," no matter by whom owned or worked. Again, a state may not assess some mines by three times the net proceeds from dumps of slag or tailings because the data is at hand and exempt others because the necessary data is either more difficult or impossible to obtain. We make the same statement only with less refinement when we say the net earnings from a dump bear no relation to the value of the mine, that any assessment built upon that basis is but an arbitrary imposition without any relation to the end sought to be accomplished, namely, the true value of the mine and is basically and theoretically wrong. The adjudicated facts of this case prove the truth of this assertion.

If the dump be the mine, the proceeds from which are to be multiplied by three to arrive at its value, then the state assessed plaintiff for something it did not own, the tax being wholly without authority of law, a deprivation of property without due process of law, in violation of the 14th Amendment to the Constitution of the United States. But it seems to us the statute does not declare dumps and tailings mines. It defines "net anuual proceeds" and requires the consideration of such proceeds from dumps whereby to arrive at the value of the mine. The statute presumes the existence of a mine and dumps produced by the mine's operation since the effective date of the present law, not old dumps accumulated years before the law was thought of from mines long since extinct. Moreover, the sole justification for applying to mines a

method of taxation different from that for the taxation of other property is the greater difficulty in valuing them, but that difficulty in no degree pertains to tailings deposits. The latter are capable of accurate measurement their tonnage of definite ascertainment, and by systematic sampling and assaying their mineral content and composition may be determined with precision. Such deposits are commonly bought and sold upon such measurement. They are capable of more accurate and convenient measurement than "lands containing coal or hydro-carbons" for which the law specifically provides an assessment at their full value.

CONCLUSION.

We submit that upon the record and by reason of the errors herein assigned and discussed the judgment should be reversed and the court below directed to enter judgment for the plaintiff upon the facts found.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

October Term, 1922.

No. 321

SOUTH UTAH MINES AND SMELTERS,
Plaintiff in Error,

vs.

BEAVER COUNTY,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR

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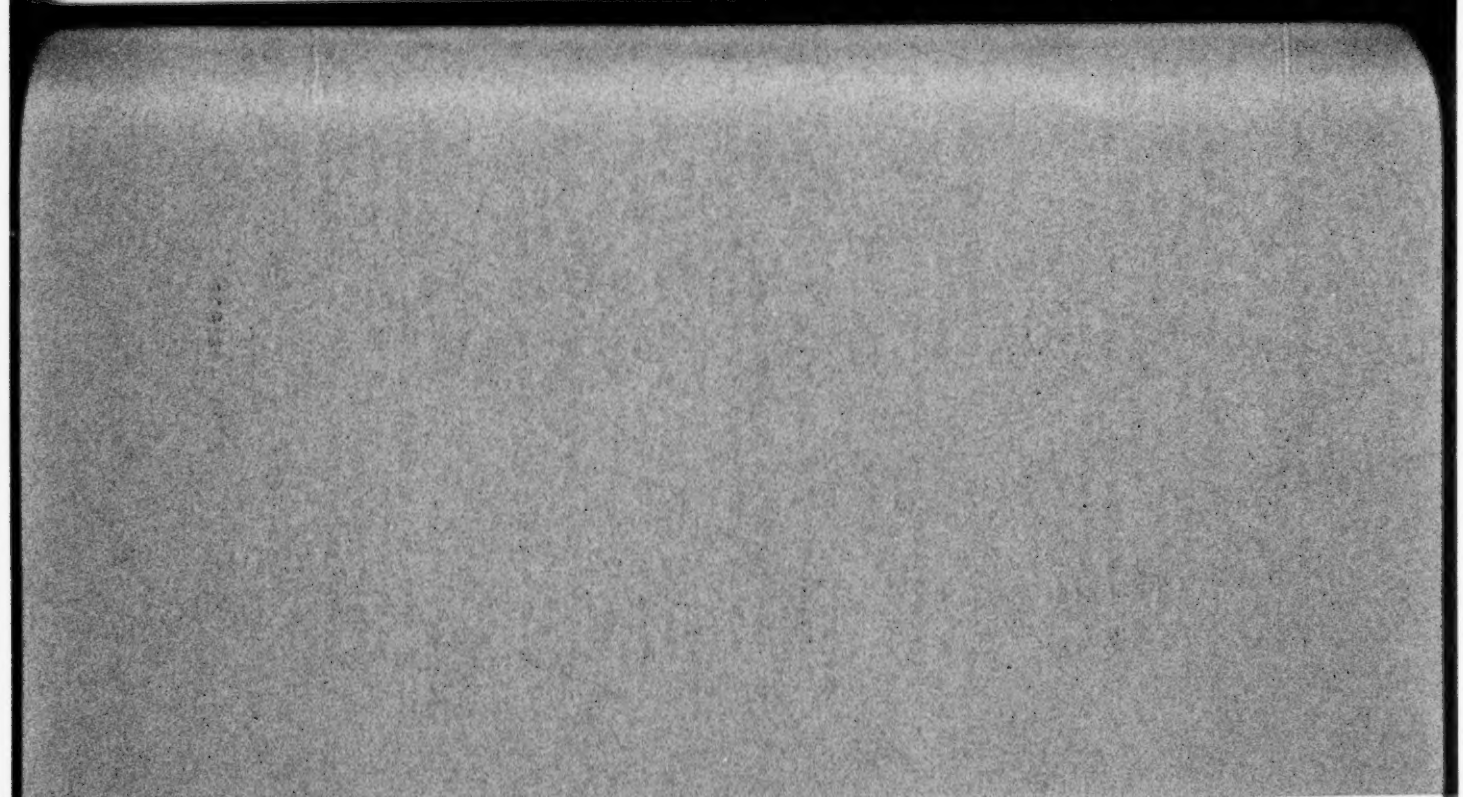

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TABLE OF CASES

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No. 321

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STATEMENT OF THE CASE.

The plaintiff mining company, and its predecessors, had for a period of eleven years operated its mine in the vicinity of the town of Newhouse, in Beaver County, Utah, on a large scale, hauling ores mined some three miles to its concentrating mill where, after saving the valuable concentrates, the remaining mineral was allowed to flow from the mill in the form of tailings and deposited

upon land owned by plaintiff and constituting a part of the land (195 Acres, Tr. 16) required by plaintiff in operating its mine or mining property. By August 4, 1914 the tailings deposit had grown to the volume of approximately 900,000 tons, the tailings containing copper, gold and silver that had been in quantities too small for profitable extraction by processes known to the mining world prior to the year 1918. The tailings were not abandoned but were at all times carefully impounded and conserved by the plaintiff mining company awaiting the day they would yield a profit, which occurred during the year 1918. During all the years the said mine or mining property was operating and the said tailings accumulating, the plaintiff mining company, and its predecessors, filed annually an itemized statement of the proceeds derived from the mine or mining property during the preceeding year, and each year the cost of operating said mine or mining property, including the cost of extracting all ores which embraced the tailings in question, were deducted from the said proceeds, and in that way the net annual proceeds were ascertained. (Tr. 16) Similar statements were furnished by the plaintiff mining company during the early part of 1919, showing the net annual proceeds derived from the said mine for the year 1918 to be $120,547.00 (being the net proceeds derived from said tailings) and under the only method provided by law for the valuation and taxation of metalliferous mines, the State Board of Equalization and Assessment, following a prac-

tice established since statehood that a tailings dump was a part of the mine from which extracted, caused said mine to be taxed on a valuation of $361,641.00. The said ores or tailings therefore were never taxed by any taxing unit of the State of Utah until they actually yielded proceeds.

On January 13th, 1914, the plaintiff mining company entered into an agreement with a corporation known as the Utah Leasing Company (Tr. 5 to 9, Incl.) providing for the treatment of the said tailings dump for the purpose of extracting the metals therefrom, namely, copper, gold and silver. The consideration therefore was a division of the profits derived from the treatment of the tailings. The operations of the Utah Leasing Company for the year 1918 only are the ones here in question. The said agreement was not a sale of the tailings. The said Utah Leasing Company was a lessee, contractor or person operating the mining property under the provisions of Section 5864 of the Laws of Utah, 1917, as amended by Chapter 114, Laws of Utah, 1919.

Plaintiff mining company paid the taxes levied against said mine under protest and brought this suit to recover the amount so paid. The trial court found that the tailings dump was a part of the mine, that the tax was legal, and that the contract with the Utah Leasing Company was not a sale of the tailings and entered judgment in favor of the defendant Beaver County, Utah, from which plaintiff in error appeals.

THE LAW.

Utah Constitution, Section 2, Article 13:

"*What property taxable, Definitions, Revenues.* All property in the State, not exempt under the laws of the United States, or under the Constitution, shall be taxed in proportion to its value, to be ascertained as provided by law. The word "property" as used in this article, is hereby declared to include monies, credits, bonds, stocks, franchises, and all matters and things (real, personal and mixed) capable of private ownership; but this shall not be so construed as to authorize the taxation of the stocks of any company or corporation, when the property of such company or corporation represented by such stocks, has been taxed. The Legislature shall provide by law for an annual tax sufficient, with other sources of revenue, to defray the estimated ordinary expenses of the state for each fiscal year. For the purpose of paying the state debt, if any there be, the Legislature shall provide for levying a tax annually, sufficient to pay the annual interest and principal of such debt, within twenty years from the final passage of the law creating the debt."

Utah Constitution, Section 3, Article 13, as amended:

"*Legislature to provide uniform tax. Exemptions.* The Legislature shall provide by law a uniform and equal rate of assessment and taxation on all property in the state, according to its value in money, and shall prescribe by general law such regulations as shall secure a just valuation for the taxation of all property, so that every person and corporations shall pay a tax in proportion to the

value of his, her or its property; provided, that a deduction of debits from credits may be authorized; provided, further, that the property of the United States, of the state, counties, cities, towns, school districts, municipal corporations and public libraries, lots with the buildings thereon used exclusively for either religious worship, or charitable purposes, and places of burial not held or used for private or corporate benefit, shall be exempt from taxation. Ditches, canals, reservoirs, pipes, and flumes owned and used by individuals or corporations for irrigating lands owned by such individuals or corporations, or the individual members thereof, shall be separately taxed as long as they shall be owned and used exclusively for such purposes; provided further, that mortgages upon both real and personal property shall be exempt from taxation; provided further, that the taxes of the indigent poor may be remitted or abated at such time and in such manner as may be provided by law; provided, further, that the legislature may provide for the taxation of homes, homesteads and personal property, not to exceed two hundred and fifty dollars in value for homes and homesteads and one hundred dollars of personal property."

Utah Constitution, Section 4, Article 13, as amended:

"*Taxation of Mines.*" All metalliferous mines or mining claims, both placer and rock in place, shall be assessed at five dollars per acre, and, in addition, thereto, at a value based on some multiple, or submultiple, of the net annual proceeds thereof. All other mines or mining claims, and other valuable mineral deposits, including lands containing coal or hydrocarbons, shall be as-

sessed at their full value. All machinery used in mining and all property or surface improvements upon or appurtenant to mines or mining claims, and the value of any surface use made of mining claims, or mining property for other than mining purposes, shall be assessed at their full value. The state board of equalization shall assess and tax all property herein enumerated, provided that the assessment of five dollars per acre and the assessment of the value of any use other than for mining purposes shall be made as provided by law."

The statutory enactments pursuant to Sections 2, 3 and 4 of the Utah Constitution, as amended, will be found in Chapter 114, Session Laws of Utah, 1919, and the sections, or parts thereof, material here, are quoted as follows:

Section 5864: "*Classification—Improvements—Rates—Segregations net annual proceeds.* All metalliferous mines, or mining claims, both placer and rock in place shall be assessed at five dollars per acre, and in addition thereto, at a value determined by taking the multiple of three times the net annual proceeds thereof. All other mines or mining claims and other valuable mineral deposits, including lands containing coal or hydrocarbons, shall be assessed at their full value. All machinery used in mining and all property or surface improvements upon or appurtenant to mines or mining claims, and the value of any surface use made of mining claims, or mining property for other than mining purposes, shall be assessed at full value. For the purposes of this section, all mills, reduction works and smelters used exclusively for the purpose of reducing or smelting the ores from a mine or min-

ing claim by the owner thereof, shall be deemed to be appurtenant to such mine or mining claim, though the same is not upon such mine or mining claim. In all cases where the surface of lands is owned by one person and the mineral underlying such lands is owned by another, such property rights shall be separately assessed to the respective owners.

The words "net annual proceeds" of a metalliferous mine or mining claim, as used in this section, are defined to be the net proceeds realized during the preceding calendar year from the sale, or conversion into money, or its equivalent, of all ores from such mine or mining claim extracted by the owner or lessee, contractor, or other person working upon or operating the property during or previous to the year for which the assessment is made, including all dumps and tailings, after making the following and no other deductions from the gross proceeds thereof."

Section 5873. "*Assessment by State Board of Equalization.* All property and franchises owned by railroads, street railroads, car, telegraph, telephone, electric light, pipe line, power, canal, irrigating and express companies, operated in more than one county in this state, and the value of metalliferous mines based on some multiple or sub-multiple of the annual net proceeds thereof, as provided in Section 5864, * * *."

Section 5929: "*Assessment of proceeds of mines.* Every person, corporation, or association engaged in mining upon a vein or lode or placer mining claim, containing any gold, silver, or other metalliferous mineral deposits, must each year

make out a statement of the gross yield of the above named metals or minerals from each mine owned or worked by such person, corporation, or association during the year next preceding the first day in January, and the value thereof, which statement shall give the fine ounces of gold and silver, and pounds of lead, copper and other metals, together with the expenditures in extracting the ore and reducing the ore and converting it into money, which statement shall show the net proceeds of such mine, including the net proceeds of leases on said mine, and the net proceeds from dumps and tailings."

"* * * The owner or owners of any mine, dissatisfied with the assessment made upon its property, may, between the third Monday in May and the second Monday in June, apply to the Board to have the same corrected in any particular, and the Board may correct and increase or lower the assessment made by it to equalize the same with the assessment of other property. Provided, that the statements required to be made to the State Board of Equalization under the provisions of this act must be furnished to the Board for the year 1919 on or before the third Monday of March."

Section 5930, Compiled Laws of Utah, 1917: "The statement mentioned in the preceding section as to net proceeds of mines must contain a true and correct account of the actual expenditures of money and labor in extracting the ore or mineral from the mine, transporting the same to the mill or reduction works, and the reduction of the ore and the conversion of the same into money, or its equivalent, during the year."

ARGUMENT.

I.

Section 4, of Article 13, of the Constitution of Utah, constitutes an exception to Sections 2 and 3 of the same Article, and places metalliferous mines in a special or separate class, and prescribes the manner in which such mines shall be valued for the purposes of taxation.

Section 2 of Article 13 requires that all property not exempt from taxation shall be taxed in proportion to its value, *to be ascertained as provided by law.* Section 3 of the same Article requires the Legislature to provide a uniform and equal rate of assessment and taxation on all property within the state, according to its value in money, and to prescribe such regulations as shall secure a *just valuation* for taxation of all property. There is nothing in Section 2 that in any wise conflicts with the provisions of Section 4; on the contrary, it is in harmony with Section 4, in that it declares that the value of all property shall be assessed according to its value in money, but requires the Legislature to prescribe such regulations as will secure a just valuation. Fully realizing that metalliferous mines constitute a class of property of such a character that their values were unknown, and were very difficult to ascertain or determine, and if their valuation were left to the judgment of the various assessors and boards of equalization, great lack of uniformity, co-extensive with the variableness of the opinions or judgments of the different assessors, and that excessively high values in some instances and rediculously low values in other instances would result, the framers of the Constitu-

tion, no doubt, deemed it absolutely necessary that the Constitution itself prescribe a method for the valuation of metalliferous mines that would be uniform and just. Under the old law, it is undeniable that the value of a mine was represented in the net annual proceeds, notwithstanding the assessors were of the opinion they were assessing the net annual proceeds only. From statehood down to the year 1919, metalliferous mines were taxed on their annual proceeds. The ores extracted and on the surface, including tailings dumps, were never separately valued and taxed by any of the various assessors and boards of equalization, except in the case of the assessor of Salt Lake County, Utah, valuing and assessing as personal property the tailings dump of the Utah Copper Company for the years 1917 and 1918, which tax was paid under protest, and suit was instituted to recover the same, Judge Johnson of the U. S. District Court for Utah, holding the tailings to be a part of the mine from which extracted and not subject to taxation as personal property, which suit is now pending on appeal to the Circuit Court of Appeals. It become apparent that the net annual proceeds was not the method that provided a fair or just or adequate valuation of metalliferous mines for the purpose of taxation, and, therefore, the amendment to Section 4 of Article 13 was proposed and submitted to the electorate at the general election on November 8th, 1918, and was adopted at that election, effective January 1st, 1919. The amendment in effect merely prescribes a true, permanent and special method for ar-

riving at the valuation of metalliferous mines. Under the old law, the value was the price paid to the United States for the surface, if it had no value for purposes other than mining, and the net annual proceeds. Under the new law, the value of five dollars per acre, if the surface has no value for other purposes than mining, and, in addition thereto, some multiple or sub-multiple of the said net annual proceeds. In the case of the State vs. Thomas, 16 Utah 86, in deciding the meaning of the clause "according to its value in money," our Supreme Court stated:

> "It evident that the term 'according to its value in money' means that all property shall be valued, for the purposes of assessment, as near as is reasonably practicable, at its full cash value; in other words, that the valuation for assessment and taxation shall be, as near as reasonably practicable, equal to the cash price for which the property valued would sell in open market, for this is doubtless the correct test of the value of the property."

In exercising their best judgment on the value of property, excepting metalliferous mines, various assessors and boards of equalization have, no doubt, applied the test laid down by the court. But that test cannot apply to metalliferous mines, *as Section 4 of Article 13 of the Constitution* has at all times prescribed a definite method to be followed by the assessors for ascertaining the value of metalliferous mines, thus depriving the various assessors and boards of equalization of all discretion in valuing that class of property.

The adoption of Section 4 of Article 13 of the Constitution shows conclusively that metalliferous mines could not be properly dealt with by the method provided for the valuation of property generally for the purpose of taxation (Section 2 and 3), and for that reason must be valued by a method that would bring about a just and adequate valuation of that special and peculiar class of property. (Section 4.) Section 4 of Article 13, therefore constitutes an exception to Sections 2 and 3 of the same Article, in that it takes metalliferous mines out of the operation of the provisions of Sections 2 and 3, relating to the valuation of property for taxation, and prescribes the method by which that peculiar class of property shall be valued.

II.

For the purpose of taxation ores in a dump, or tailings, are in Utah a part of the mine from which extracted, and the proceeds derived from them must be regarded as derived from the mine.

The taxing authorities of Utah are prevented by the Constitution and Laws of Utah from placing value on ores or tailings until they yield a profit.

Tailings cannot be valued or taxed as other property not within the classification of metalliferous mines are valued and taxed.

Ores or tailings are not personal property for the purposes of taxation.

Tailings, or low-grade ores, or partially treated ores, are, by the express provisions of the laws of Utah, made a part of the mine from which extracted. Section 5864, supra, in defining the term "net annual proceeds" of a metalliferous mine specifically provides that the terms

shall be so comprehensive as to include the proceeds realized from all ores extracted from the mine, *including all dumps and tailings.* Section 5929, supra, requires all metalliferous mine owners or operators to include in their annual reports of proceeds to the State Board of Equalization and Assessment *the proceeds from the mine and the proceeds from dumps and tailings.*

> "The terms 'mines' is not limited to mere subterranean excavations or workings, nor is 'minerals' limited to the metals or metalliferous deposits, whether contained in veins that have well defined walls or in beds or deposits that are irregular *and are found at or near the surface, or otherwise.*" (Italics ours.) Nephi Plaster & Mfg. Co. vs. Juab County, 33 Ut. 114, 93 Pac. 53, decided Dec. 4, 1907.

> "It is not a question of whether the mine owner or operator gains net proceeds or net profits from his mine when considered as a business venture, but the only question is: did the mine or mining property yield net proceeds for the particular year in which they are assessed? *Nor does it make any difference whether the ores are obtained from the mine or from a dump, if in fact they were at some time taken from the mine.*" (Italics ours.) Mammoth Mining Co. vs. Juab County, 51 Ut. 316; 170 Pac. 78, decided January 15, 1918.

> "The term 'mine' means a mining property so developed as to yield ore but capable of yielding a profit. The term 'mine' thus construed is broad enough to include within its scope and meaning *any* developed and producing body of ore."

(Italics ours.) Northern Pac. Ry Co. vs. Musselshell Co., 169 Pac. 53 (Montana).

> "The terms 'mine' and 'mineral' are not definite terms; they are susceptible of limitation according to the intention with which they are used; and in constructing them, regard must be had not only to the deed or statute in which they occur, but, also, to the relative position of the parties interested and the substance of the transaction or arrangement which the deed or statute embodies. Consequently, in themselves these terms are incapable of a definition which would be universally applicable." Lindley on Mines, Vol. 1, Section 87, 3rd Ed.

In the case of Waskey vs. McNaught, 163 Fed. 929, decided July 6th, 1908, a question involving the character of ore severed from the body of the mine and placed upon the surface was before the court. The striking decision of the court is quoted in part as follows:

> "The contention of the defendants that the ore severed from the body of the mine and placed upon the surface loses its character of real property and becomes personalty from the time of its severance is untenable in this case. It is difficult to determine from the record whether the sand and gravel referred to by counsel as 'ore' is still on the ground in dispute, or has been removed to ground described as a fractional claim between the Roosevelt and Golden Bull claims. The affidavits of both plaintiffs is to the effect that it has been so removed. If so, it is not within the terms of the injunction order appealed from which restrains the defendants from rocking and sluicing

or in any manner working in or upon the premises in controversy and particularly set forth in plaintiffs' complaint. The defendant, Crabtree, on the other hand, appears to admit in his affidavit that the sand and gravel which has been taken from the lower part of the mine is still on the surface of the ground in dispute. Assuming that the latter statement is correct, we are of the opinion that the removal of this sand and gravel from one part of the mine to another is not such a severance from the realty as to make it personalty. The gold contained in the sand and gravel is still to be separated therefrom by rocking and sluicing. It is still a part of the placer mine to be worked like any other part, and it is this working of the mine that the injunction is intended to restrain pending the litigation as to the title."

To the same effect are:

Mathews Slate Co. vs. Advance Ind. Supply Co., 172 N. Y. S. 830;

Riter vs. Lynch, 123 Fed. 930;

Bassett vs. Utah Copper Co., 219 Fed. 811;

Goldfield Con. Co. vs. State, 127 Pac. 77 (Arizona);

Earhart vs. Powers, 148 Pac. 286 (Nev.).

The meaning of Section 4, of Article 13, of the Constitution, was determined by the Utah Supreme Court in the early case of Mercur Gold M. & M. Co. vs. Spry, 16 Utah 222, 228, decided March 14, 1908, and has been followed ever since. In that case the court, among other things, said:

"By the term 'net annual proceeds of the mine' is meant what is annually realized from the product of the mine, over and above all the costs and expenses of obtaining such proceeds and converting the same into money. * * * The product of a mine is usually uncertain. While the product may be large the first year, it may be greatly lessened, or the losses and expenses overbalance the product, the second year. With respect to the taxation of the net annual product of a mine, it must have been contemplated that the product should be ascertained at the end of the fiscal year, and should not be simply estimated by the assessor on the basis of its net product the previous year. Nor could it have been intended that the assessment should be levied unless there was some net annual product to levy it upon at the end of the year. * * * Section 4, Art. 13, of the Constitution, requires that all net annual products of all mines and mining claims shall be taxed as provided by law. This is a limitation on the power of the legislature, so that, so far as the product is concerned, nothing can be taxed except the net annual product of the mine. The legislature doubtless had this limitation in mind when sections 62-65 were enacted. How the net proceeds shall be ascertained, the time for which net proceeds shall be taxed, etc., are clearly set forth in these sections of the statute, and only that which exists and has been ascertained as the annual net proceeds of the mine is to be assessed and taxed."

The Supreme Court of Utah again speaking on this same subject in the case of Nephi Plaster & Mfg. Company vs. Juab County, 33 Utah 115 to 129, among other

things says:

> "It appears from the record that the respondent was then the owner of a placer mining claim patented, on and in which are contained large and valuable deposits of gypsum, which deposits are, and for a number of years, by means of the necessary buildings, machinery, and appliances erected on said mining claim, have been manufactured or converted into hard wall plaster, dental plaster, finishing plaster, fertilzers and other manufactured products, all of which were sold on the market. The tax involved represents the ordinary rate of taxes imposed on the net proceeds or profits derived by the respondent from the sale of the products aforesaid, and were imposed by virtue of Section 4 of Article 13 of the Constitution of this state. * * * The district court entered its conclusion of law to the effect that the profits derived from the product manufactured from the gypsum taken from respondent's mining claim was not the subject of taxation as the net proceeds of mines and mining claims. * * * The only question for solution, therefore, is, does the profit realized from the *product manufactured from the gypsum taken from respondent's mining claim constitute 'net proceeds' under the clause in the Constitution that all net proceeds of 'all mines and mining claims' shall be taxed, as the term is used in the Constitution?* If it does, the court erred; if it does not fall within the clause, then gypsum, or the manufactured product therefrom, must be taxed generally as other manufactured products, and not under this section. * * * From what has been said it follows that the trial court erred in the conclusion of law, and in entering judgment for the respondent." (Italics ours.)

The last word of the Supreme Court of Utah on this subject is found in Mammoth Mining Co. vs. Juab County, 51 Utah 316, 319, decided January 15, 1918. The facts as stated by the court are:

> "The record shows that during the period from 1876 to 1890 the respondent in operating its mine developed certain ores which were then of too low a grade to be profitably shipped and reduced. Those ores from year to year were placed in a dump, and in 1913, when cheaper processes of reducing ores had been discovered, they then could be and were shipped and reduced at a profit, as hereinafter stated."

In the last above mentioned case the tax was levied upon the net proceeds under Section 4, of Article 13, of the Utah Constitution, and the question involved in the case before the Supreme Court of Utah was the cost and expense that should be deducted from the gross proceeds in determining the net proceeds upon which the tax should be paid; but the court's decision was unconditionally and unquestionably predicated on the fact, already established, that the low-grade ores, which many years prior had been removed from the mine and placed in a dump, were a part of the mine from which extracted and were subject to taxation only under the provisions of Section 4, of Article 13, of the Constitution.

The facts in the Mammoth Mining case, 51 Utah 316, supra, are identical with the facts in the instant case and the decision in the former could not have been reached without deeming the dump a part of the mine.

If the question of whether the low-grade ores in the dump were taxable "as other valuable mineral deposits," or "as personal property," had been before the court, it manifestly would have ruled in unequivocal terms contrary to the contention of plaintiff in error in the case at bar; for what substantial distinction is there betweer the tailings dump of the plaintiff in error herein and the low-grade ores, placed in a dump, referred to in the Mammoth case?

If immediately following the milling of the ores from which the tailings resulted, the tailings had been made to undergo still further ~~consideration~~ concentration, by which their metal content would have been extracted, can there be any doubt whatever that the net proceeds derived from the sale of the metals would have been regarded as proceeds from the mine and taxable under Section 4, of Article 13, of the Constitution? The only reason plaintiff in error had for impounding and conserving the tailings was the hope that the valuable metals contained therein could, at some future day, be removed at a profit. It knew that the dump had no more value under our law than barren country rock, and that it could not be taxed, and it was not taxed, until it yielded proceeds.

It is clear that under the laws of Utah, and the authorities above cited, that the term "mine" is not limited to the "hole in the earth," but is so comprehensive as to embrace ores or tailings removed from the earth and placed on the surface. It is further clear and well established in Utah that the product, manufactured or other-

wise, of the mine is not taxable until converted into money. Under the law prior to 1919 the net annual proceeds constituted absolutely the value of the mine, used in its broad sense. The amendment to the Constitution and the Laws of Utah effective January 1, 1919, did not change the method of taxing metalliferous mines in any way except that the value of such mines should be ascertained by multiplying the net annual proceeds by three. The product of the mine still is not subject to taxation except under the provisions of Section 4, Article 13, of the Constitution, as amended. The tailings dump of the plaintiff in error was a part of its mine, or a product of its mine, and the net annual proceeds derived therefrom was the basis, and the only basis, under the Constitution and Laws of Utah, by which the value of the mine from which the tailings came could be ascertained and taxed. We are here concerned with a Utah mine and the ores or tailings removed from that mine, and the question of whether or not, under the Constitution and Laws of Utah, that mine and those ores have been legally taxed. The decisions of the Supreme Court of Utah are controlling. The Supreme Court of the United States will follow the rule established by the State Court in construing its own constitution and statutes.

III.

The agreement of January 13, 1914, between the plaintiff in error and the Utah Leasing Company did not constitute a sale of the dump.

Having in mind the distinguishing characteristics of a license, a lease and a sale, you will search the contract in question in vain for anything that will characterize it as a sale of the tailings dump. It falls short of even being a lease and properly it can be styled nothing more than a mere license to extract the metals from the dump on a division of the profits.

Throughout the contract, the dump is referred to as "*the tailings dump of the mining company,*" and there are no words in it that transfer the title to the leasing company; in fact it contains no words that even grant a limited estate, but on the contrary it merely grants permission, or a privilege, to do the things therein specified. The leasing company was not obligated to perform any of the conditions of the contract; in other words, if it failed entirely to perform, the mining company could not collect any penalty or damage therefor, and, if after commencing performance it should cease operations and fail and refuse to resume, the mining company could annul the contract upon ten days' notice. There is nothing to indicate a transfer of the title to or the granting of an estate in the tailings dump; but all considered the contract merely gives a privilege or license to extract the metals contained therein, upon a profit sharing basis.

Paragraph 13 of the contract specifically provides that the agreement shall be construed as an option. The agreement, therefore, must be given the construction that it iself requires, as that is the construction the parties

thereto agreed to in determining their rights and privileges thereunder.

In the case of Couch et al. vs. Welch and Mining Company, 24 Utah 36-44-45 (decided Nov. 13, 1901), the question involved was, whether or not a certain agreement was a sale or lease of a mine. The facts and the decision of the Supreme Court of Utah follows:

> • • • "On May 5, 1899, the appellants, who were the owners of the mining claims, executed a bond and lease to Ernest G. Miller and Peter McCourt, who then assigned the same to the respondent Huntsman Copper Mining Company. The contract thus assigned contained a covenant granting to the lessees the exclusive right to purchase the mining claims at a stipulated price, and also covenants obligating the lessees to perform certain work upon the claims to improve the same, with the right to mine and sell the ore, and to pay to the lessors certain amounts as royalty, all of which amounts so paid, if any, to apply as part payment of the purchase price in the event of the election by the lessees to purchase the claims, and of their compliance with the conditions of the bond and lease. The contract also provided for forfeitures of all the rights of the lessees, together with all moneys, if any, paid as part of the purchase price, in case of a failure to comply with the conditions of the agreement. After the execution and assignment of the bond and lease the respondent company went into possession of the property, and, among other things, erected thereon a bunk house and boarding house, and also constructed a track of iron or steel rails in the tunnel, all of which

were used in operating the mine. These buildings and track the respondents, while yet in possession removed from the claims; and thereafter the lessors declared a forfeiture, claiming a failure or refusal on the part of the lessees to carry out the provisions of the agreement. * * * The decisive question presented is whether the respondents had the right, under the contract, to remove the buildings and track during the term, and while in possession of the mining claims. It is insisted by the appellants, as appears, that the bond and lease constituted simply a contract of purchase, that the relation of landlord and tenant did not exist, and that the buildings and track in dispute were fixtures of a permanent character, and formed a part of the realty. In neither of these propositions are we able to concur. The contract contains essential characteristics of a lease. On its face it appears that the lessors were 'desirous of leasing' as well as selling the property. In the agreement they 'grant, lease, and demise' the mining claims, fix the term of the lease, and provide for work to be performed, which is to be 'not less than ninety shifts' each month 'during the term of the lease.' Rent is reserved by way of royalty, and the manner of its payment stipulated. Forfeiture and surrender of possession are provided for in the event of a failure on the part of the lessees to perform any of the covenants of the lease to be performed by them. These are elements of a lease. In fact, an examination of the instrument shows that the evident design of the lessors was to lease the mining claims and grant to the lessees the privilege to purchase them, and the mere fact that the agreement also contains a covenant granting the 'privilege of purchasing'

> the demised premises does not destroy its character as a lease. Nor is such a covenant inimical to the existence of the relation of landlord and tenant between the parties prior to the exercise of the privilege. * * * (Cases cited.) Nor does the fact that the contract provides for the payment of royalty, instead of rent in money, change the character of the instrument, or prevent the creation of the relation of landlord and tenant. Rent may be made payable otherwise than in money. We are of the opinion that the contract in this case must be regarded as a lease, and that the relation of landlord and tenant existed between the parties to this controversy."

In the case of Seward Dredging Company, 242 Fed. Rep. 225, 227, 228 (Circuit Court of Appeals, Second Circuit, decided April 10, 1917), the question of whether or not a certain agreement for the working of a mine was a sale, was involved. The facts and the decision of the court follows:

> "A written contract was made by bankrupt with one Estabrook, to the effect (so far as material), that Estabrook should 'take possession' of the mine, furnish machinery and material to work it, and himself extract gold, keeping careful accounts of expenses and receipts. At the end of the first summer's work, Estabrook was to have the right or option of enlarging and continuing his operations on a royalty basis; but, if he did not find the enterprise to his liking, the contract was then to terminate, and accounts between the contracting parties were to be stated in the following manner: The actual cost of installation of mining

plant, plus cost of operation for the summer or mining season, should be credited to Estabrook, and the gold recovered by Estabrook should be credited to the bankrupt. If the balance was against Estabrook, he was to pay the same to the bankrupt; but if the value of the gold was less than cost of plant and operation, the bankrupt was to pay Estabrook the difference, 'and thereupon all of said improvements shall become and remain the property of' the Seward Dredging Company.

Estabrook did not exercise his option, the gold recovered during the first experimental season (1914) did not equal Estabrook's expenditure by over $25,000 and that difference the Seward Company never paid. It did, however, resume possession of its mine before bankruptcy, and Estabrook did not remove therefrom his machinery, etc., which passed into the physical possession of the trustee, and therefore into the 'custody of the bankruptcy court.' A large part of Estabrook's plant consisted of chattels, of which only one need be specified, an oil-burning combustion engine of considerable size, used for driving a generator, a machine which was shipped to the remote and difficult region of the mine in small parts, there assembled, and bolted to a concrete bed, contained within a house, of a very rough and cheap construction. The trustee in bankruptcy having refused to surrender any of Estabrook's apparatus, he filed petition to compel delivery to him of the chattels, which (or whose value) are the subject of this appeal. If he is entitled to the engine, it is too plain for argument that his right extends to all he has demanded.

* * * It is not true that the contract between Estabrook and the bankrupt was a convey-

> ance in the sense that it transferred anything that could be called realty or constituted a lease. An agreement exactly similar in legal effect was held not a lease, and no more than a contract for labor to be performed, merely fixing compensation for services rendered, in Hudepohl vs. Mining etc. Co., 80 Cal. 553, 22 Pa. 339, in which case the document considered was called a lease by the parties, a fact taken into consideration merely as evidence of ignorance. There, *as here,* the contractor was formally given possession of the mine, a fact which made him no more than a licensee."

The agreements construed in the two cases next above cited, were couched in terms looking toward a sale much stronger than the agreement between the South Utah Mines and Smelters and the Utah Leasing Company, which agreement it seems to us, does not even savor of a sale or lease, for the mining company was always guarding its title to the dump.

Furthermore, in considering an agreement of this nature, the taxing laws of Utah must be given serious consideration. They form a controlling element in the construction of such an agreement *for the purposes of taxation.* Section 5864 of the Laws of 1917 was amended by the Legislature of 1919, and as amended appears in Chapter 114, page 320 of the Session Laws of 1919, the part of which, material here, reads as follows:

> "The words, 'net annual proceeds' of a metalliferous mine or mining claim as used in this section, are defined to be the net proceeds realized during the preceding calendar year from the sale,

> or conversion into money, or its equivalent, of all ores from such mines or mining claim *extracted by the owner or lessee, contractor or other person working upon or operating the property,* during or previous to the year for which the assessment is made, including all dumps and tailings, after making the following and no other deductions from the gross proceeds thereof."

The above statute consolidates the interest of the owner, lessee, contractor or other person working upon or operating the property. The net proceeds of any or all of them must be used as the criterion for arriving at the value of the mine. It would take an unambiguous and absolute sale to take a mine or any part of it out of the operation of the statute for the *purposes of taxation.* The Utah Leasing Company under its agreement, in the light of the above statute, was nothing more than an operator or licensee for a division of the profits derived.

The plaintiff in its brief cites many cases where lessees of coal deposits were construed to be sales for the purposes of taxation. Those cases are wholly inapplicable here. If the state were taxing the metals themselves, as it does coal, the cases would apply; but the states does not under the law tax the metals themselves, but uses the net proceeds derived from the metals as the basis of arriving at the value of the mine.

IV.

The provisions of Section 4, of Article 13, of the Constitution of Utah and the Statutes passed in pursuance thereof do not violate that part of Section 1, of the 14th amendment of the Constitution of the United States wherein it is provided that no State shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Section 4 of Article 13 of the Constitution and the statutory enactments pursuant thereto, places all metalliferous mines in a class, separate from other species of property, for the purpose of taxation, prescribing the precise method by which their valuation shall be determined.

> "If there is a reasonable ground for the classification and the law operates equally on all within the same class, it is valid. And this is true even though the act confers different rights or imposes different burdens on the several classes. It is not necessary for the statute to show on its face the reason for the classification adopted. In determining whether or not a basis of classification is reasonable, it must be looked at from the standpoint of the legislature enacting it, the question of classification being primarily for the legislature. A statute will be sustained where the basis for classification made by it could have seemed reasonable to the legislature, even though such basis seems to the courts to be unreasonable. Legislative discretion in this matter is not subject to review by the courts, except to the extent of deter-

mining whether the classification adopted is arbitrary, unreasonable and unjust. As in all the other cases involving the validity of statutes, all reasonable doubts are to be resolved in favor of upholding the validity of legislation establishing a classification; and the legislative judgment as to the classification can be overthrown by the courts only when it is clearly erroneous. Classification must be reasonable and not merely arbitrary. There is no general rule by which to distinguish reasonable and lawful from unreasonable and arbitrary classifications." Corpus Juris, Volume 12, Pages 1128, 1129, 1130.

"The guaranty of the equal protection of the laws does not deprive the states of the power to adjust their systems of taxation in accordance with their own ideas of public policy. They may, therefore, tax certain classes of property to the exclusion of other classes, and may prescribe different methods of assessment, different rates of taxation, different means of enforcing the collection of taxes, and different penalties for non-payment, for the different classes of persons or property. And since taxation is so largely a question of policy, the legislature possesses the largest measure of discretion in these matters. The courts will not declare a tax statute void as a violation of the equal protection guaranty so long as the classification or selection made by it is based on a reason, even though in their opinion te reason is a poor one, and the statute, itself, is unjust."

Corpus Juris, Volume 12, Pages 1151, 1152.

In the case of Michigan Central Railroad Company vs. Powers, 201 U. S. 245, decided April 2nd, 1906, the

power of the state to separate a particular class of property, subject it to assessment and taxation in a mode and at a rate different from that imposed upon property was discussed at great length, the court holding that the power of the state so to do was not open to question.

> "There is no general supervision by the nation over state taxation, in regard to which state has, generally speaking, the freedom of a sovereign both as to objects and method. Syllabus No. 2.
>
> "Nothing in the Federal Constitution prevents a state from separating a particular class of property and subjecting it to assessment and taxation in a mode and by a rate different from that imposed on other property and applying the proceeds to state rather than local purposes." Syllabus No. 7.
>
> "A legislature is not bound to impose the same rate of tax upon one class of property that it does upon another; it is sufficient if all of the same class are subjected to the same rate and the tax is administered impartially upon them."
>
> Syllabus No. 9.
>
> "We think we are safe in saying that the fourteenth amendment was not intended to compel the state to adopt an iron rule of equal taxation. If that were its proper construction, it would not only supersede all those constitutional provisions and laws of some of the states, whose object is to secure equality of taxation, and which are usually accompanied with qualifications deemed material; but it would render nugatory those discriminations

which the best interests of society require, which are necessary for the encouragement of needed and useful industries, and the discouragement of intemperance and vice; and which every state, in one form or another, deems it expedient to adopt."

Bell's Gap Railroad Company vs. Pennsylvania, 134 U. S. 232.

"It is well settled that the states may classify the property within the state and impose unequal taxation, provided the taxes are uniform on all property in each class, without violating the provisions of the fourteenth amendment of the Constitution of the United States."

Union Sulphur Company vs. Reed, 249 Fed. 172.

The fourteenth amendment does not prohibit special legislation. Indeed, the greater part of all legislation is special, either in the extent to which it operates, or the objects sought to be obtained by it.

Home Insurance Company vs. New York, 134 United States 594.

The Legislature has power to classify property for taxation and to impose a heavy burden on one class and no burden on another class, provided all property in the same class is treated alike, and the tax is imposed on all property of the class.

Farrington vs. ————, 79 North Eastern, 884 (New York).

To the same effect, see:

Gross Production Tax of Wolverine Oil Company, 154 Pac. 362 (Oklahoma).

In the case of the Northern Pacific Railway Company vs. Musselshell County, 169 Pac. 53, supra, the court, in regard to the classification of mines, stated:

> "The purpose of Section 3 was to provide a special method for the assessment and taxation of mining property. The making of the special provision on the subject shows conclusively that the convention was of the opinion that this species of property though falling generally within the definition of 'property' as made in Section 17 could not be justly dealt with by the method provided for other real property, and, therefore, must be valued and taxed by a method which would accomplish this desired result."

We direct the court's special attention to the case of Tallon vs. Vindivator Consolidated Mining Company, 149 Pac. 108 (Colorado), decided April 5th, 1915. This case considered at length the matter of classification of metalliferous mines and the establishment by the Legislature of a definite method for valuing such mines. The court, among other things, said:

> "Metalliferous mines constitute a class of property of such a character that their values are unknown, uncertain, fluctuating, hard to estimate and difficult to ascertain. Ordinarily, it would be impossible for the assessor to know the extent or valuation of ore shoots of a mine. The value, ultimately, of course, depends upon the net proceeds derived from the ore, but this cannot be known until the ore has been extracted, after which the mine, as such, has no value. The assess-

ment, from the nature and character of the property, furnishes an intricate, perplexing and difficult problem in taxation of many and peculiar complications. Unless some legislative rule of uniformity is established by which the value of mines may be approximated for taxation, great lack of uniformity will result, occasioned by assessors of the various mining counties following different rules, or adopting different methods in arriving at valuations. It is, therefore, held, for the purpose of securing uniformity throughout this state in the assessment for taxation of this class of property, that the Legislature may adopt any rule it sees fit that is not palpably unjust, oppressive, or inadequate."

"It may produce some inequality and hardship in particular cases, as the other acts undoubtedly did, but the ingenuity of men cannot devise a system for the taxation of mines in which this will not be the case. From the very character of the property there can be no system evolved that in some instances will not produce inequality and lack of uniformity in taxation. So long as our present system of assessment prevails, such inequailty must be treated as unavoidably incident."

Equally as important as the Colorado case next above cited, is the case of Hilger vs. Moore, 182 Pac. 477 (Montana), decided June 18th, 1919.

"The inhibition of that amendment that no state shall deprive any person within its jurisdiction of the equal protection of the law, was designed to prevent any person, or class of persons, from being singled out as a special subject for dis-

crimination and hostile legislation. Pembina & Min. Company vs. Pennsylvania, 125 U. S. 181, 188, 8 Sup. Ct. 737, 31 L. Ed. 650. It is to be presumed, however, that in providing for its public revenues, this state had no favors to bestow and did not intend arbitrarily to deprive any one of his rights. Special privileges are always obnoxious, and discriminations against any person or class still more so, and no presumption will be indulged that the Legislature intended to create either.

While it is impossible to lay the burden of taxation so unevenly as to deprive some taxpayers of the equal protection of the law, the mere fact that property is classified for the purpose of taxation does not bring the statute classifying it within the inhibition of the fourteenth amendment. As early as 1873, the Supreme Court of the United States referred to this question and said:

'Absolute equality in taxation can never be attained. That system is the best which comes the nearest to it. The same rules cannot be applied to the listing and valuation of all kinds of property. Railroads, banks, partnerships, manufacturing associations, telegraph companies, and each of the other numerous agencies of business, which the inventions of the age are constantly bringing into existence, require different machinery for the purpose of their taxation. The object should be to place the burden so that it will bear as nearly as possible equally upon all. For this purpose different systems, adjusted with reference to the valuation of different kinds of property, are adopted. The courts permit this.' Tappen vs. Merchants's National Bank, 19 Wall, 504 (22 L. Ed. 189)."

It is well settled law that the fourteenth amendment, forbidding any state to deny to any person within its jurisdiction equal protection of its laws, does not prevent the state from classifying property for the purpose of taxation, or separating a particular class from other property and prescribing a special mode by which the valuation of that particular class may be ascertained, providing the classification is based upon reasonable grounds and is not a mere arbitrary selection. The plaintiff, the South Utah Mines and Smelters, concedes as true this well known provision of law. The only question for consideration, therefore, is whether or not the classification of metalliferous mines and the mode prescribed for their taxation are predicated upon reasonable grounds. The answer is so self-evident that it seems a waste of time to discuss it. From the vast amount of legislation and litigation concerning metalliferous mines and the taxation thereof, it is manifest that the subject has been and still is a very troublesome one the country over. That a metalliferous mine is a property of a peculiar character, furnishing intricate, perplexing and difficult problems concerning taxation, cannot be doubted. That it is beyond the ingenuity of man to devise a system of taxation for metalliferous mines that will not produce some inequality and hardship in particular cases, it is also true. To leave to the discretion of the various assessors and boards of equalization, whose judgment naturally would be shockingly variable, the valuation of property whose value is unknown and absolutely incapable of defi-

nite ascertainment, would create a lack of uniformity and equality among different owners of that particular class of property, that would be decidedly unreasonable and unjust. These truths alone, it seems to us, are sufficient to overwhelm one called upon to determine whether or not our classification of metalliferous mines for the purpose of taxation is reasonable and just.

How to value a metalliferous mine has been the most difficult problem that ever confronted the commonwealth. The value is unknown. A mine is incapable of definite valuation for no one knows what the earth contains. No one can place any definite valuation on metalliferous mines, because he does not know the quality or quantity of the ores in the vein or veins. There may be an immense quantity of high grade ores and there may be a decided scarcity. He does not know which is the case and cannot determine. Assessors, therefore, would have schemes of their own concoction for valuing a mine, which would be palpably divergent. Can it be said persuasively that the state, or the Legislature cannot devise a method for the valuation of property of such an inherently peculiar nature; that the state or Legislature cannot declare its own discretion in such a matter and deprive the various assessors and boards of equalization of all discretion in such cases? We think not. Our constitution, from statehood down to 1919, required that the net annual proceeds be taxed. "The net annual proceeds" unmistakably in the intention of the framers of that instrument, represented the value of a mine. That method,

plaintiff states, was unobjectionable. But the method did not, however, establish a fair and adequate valuation of the property, and, therefore, the constitution was amended, so as to specifically require that all metalliferous mines be valued at some multiple or submultiple of the net annual proceeds. This method or scheme, in view of the difficulties connected with the valuation of metalliferous mines, is fair, just and reasonable. It is not arbitrary, that is, predicated upon unreasonable grounds. The grounds are pre-eminently reasonable. The method applies to all metalliferous mines alike. There is no discrimination among the members of that class. The question of rate is not inovlved in this discussion, but suffice it to say that the rate of taxation is uniform and applies equally to metalliferous mines as to all others within the state.

We submit that the classification of metalliferous mines and the method for the determination of their value are reasonable, fair and just, and wholly within the power of the state and the Legislature, and are not, in any way, violative of that part of Section 1 of the fourteenth amendment of the Constitution of the United States, wherein it is provided that no state shall deny to any person within its jurisdiction the equal protection of the laws.

We are here considering the Laws of Utah relating to taxation of metalliferous mines located in Utah. The product of metalliferous mines in Utah are not taxable

until they are converted into money, and then the profit derived therefrom is used as a basis for arriving at the value of the mine. If the products of mines of the other states are shipped into Utah then those products form another or different specie of property, and of course would be taxed under the provisions of laws not here involved.

We submit that the record is free from error and for the reasons hereinabove given, and the authorities cited, the judgment of the lower court should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

October Term, 1922.

No. 321.

SOUTH UTAH MINES AND SMELTERS, PLAINTIFF IN ERROR,

vs.

BEAVER COUNTY.

PLAINTIFF'S REPLY TO BRIEF OF DEFENDANT IN ERROR.

C. C. PARSONS,
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Counsel for Plaintiff in Error.

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PLAINTIFF'S REPLY TO BRIEF OF DEFENDANT IN ERROR.

The Old Law and the New.

A word in reply to the brief of defendant in error is necessitated by confusion certain to result from counsels' treatment of the Utah constitutional and statutory provisions for the assessment of net proceeds of mines in force prior to January 1, 1919, and the presen constitutional and statutory provisions for the assessment of mines at a so-called "valuation" prescribed at three times their net proceeds. At page 10 of defendant's brief it is said:

> "Under the old law, it is undeniable that the value of a mine was represented in the net annual proceeds, notwithstanding the assessors were of the opinion they were assessing the net annual proceeds only. From statehood down to the year 1919, metalliferous mines were taxed on their annual proceeds."

At page 20:

> "Under the law prior to 1919 the net annual proceeds constituted absolutely the value of the mine, used in its broad sense. The amendment to the Constitution and the Laws of Utah effective January 1, 1919, did not change the method of taxing metalliferous mines in any way except that the value of such mines should be ascertained by multiplying the net annual proceeds by three. The product of the mine still is not subject to taxation except under the provisions of Section 4, Article 13, of the constitution as amended. * * * The decisions of the Supreme Court of Utah are controlling. The Supreme Court of the United States will follow the rule established by the State Court in construing its own constitution and statutes."

Then at page 27, in the discussion as to whether or not the Utah Leasing Company agreement effected a sale of the dump, with relation to the cases cited by us, it is said:

> "The plaintiff in its brief cites many cases where leases of coal deposits were construed to be sales for the purposes of taxation. Those cases are wholly inapplicable here. If the state were taxing the metals themselves, as it does coal, the cases would apply; but the state does not, under the law, tax the metals themselves, but uses the net proceeds derived from the metals as the basis of arriving at the value of the mine."

And at pages 36 and 37:

> "Our constitution, from statehood down to 1919, required that the net annual proceeds be taxed. 'The net annual proceeds' unmistakably in the intention of the framers of that instrument, represented the value of a mine. * * * But the method did not, however, establish a fair and adequate valuation of the property, and, therefore, the constitution was

amended so as to specifically require that all metalliferous mines be valued at some multiple or submultiple of the net annual proceeds."

The taxation of net proceeds would, in our opinion, be constitutionally sound with or without an applied multiple. That would be an income tax, the multiple serving merely to augment the levy. Were such the present tax we would not be here complaining. Under the old law a certain definite income was taxed to its owner. See Section 5929, Compiled Laws of Utah, 1917 (now repealed), as follows:

> "Every person, corporation, or association engaged in mining upon a vein or lode, or placer mining claim, containing any gold, silver, coal, or other valuable mineral deposits, must each year make out a statement of the gross yield of the above named metals or minerals from each mine owned or worked by such person, corporation, or association during the year next preceding the first Monday in January, and the value thereof, which statement shall give the fine ounces of gold and silver, and pounds of lead and copper, also the net annual proceeds of coke made from coal, or bullion or matte made from ore not taxed which is deemed a product of mines."

However, we may interpret the Utah Leasing Company contract, whether as a sale, lease, license, or working agreement, we cannot disagree upon this, that 90 per cent of the net proceeds belonged to the Utah Leasing Company and 10 per cent to the plaintiff in error. See 27 Cyc. 700, paragraph (d):

> "When ore is mined under a lease, the title to it vests absolutely as personal property in the lessee as soon as it is mined and removed from its original place."

Also Meeks v. Clear Jack Mining Company, 141 Mo. App. 648, 124 S. W. 1084, at 1088:

> "By reading the instrument it will be noticed that it confers present rights: It is assignable; it is for a fixed period; it provides for a regular rental, and the right to mine is exclusive in the lessees for the period fixed in the lease; the rent or royalty is, by express terms, payable at certain times, and we are satisfied that under the provisions of this instrument, and during the 20-year period named therein, no one but the lessees and their assigns had any right to mine said premises or any part thereof. These things being true, it must be conceded that the lessees had the right to the possession of the ore in the ground, and after it had been cleaned, and that the landlord had no interest therein, and had no right to interfere with the tenant's possession thereof. * * * Where, by the terms of the lease, the tenant is to thresh the wheat crop and to deliver to the landlord a certain share in the bushel, the tenant has the right to possession of the wheat, and may maintain replevin therefor, even against the landlord."

Were the assessment under the old law, with or without the multiple applied, we would have been taxed upon our 10 per cent and the Utah Leasing Company upon its 90 per cent and that would have been the end of the matter. We would not have been taxed for the income of others.

Such, however, was not the theory of the assessment that brings us here. Nor was such the interpretation put upon the present constitutional and statutory provisions by the taxing authorities. After quoting at pages 26 and 27 of defendant's brief from Section 5864, Compiled Laws of Utah, 1917, as amended by Chapter 114, Session Laws of Utah, 1919 (at page 320), counsel say (p. 27):

> "The above statute consolidates the interest of the

> owner, lessee, contractor or other person working upon or operating the property. The net proceeds of any or all of them must be used as the criterion for arriving at the value of the mine."

Were the Utah Leasing Company contract to have possessed every technical feature of a sale, the situation would have been precisely the same, as the taxing authorities interpret the statute, for it makes no difference who works the dump, or where, whether in the state or out of it, or who may be its owner, three times the net proceeds from such operations must be this so-called value of the mine from which it came. The taxing authorities were fully advised by our protest of our mere royalty interest and that of the Utah Leasing Company, but taxed we were nevertheless, not merely upon what we owned, our 10 per cent royalty, nor on three times that royalty, but instead upon three times the Utah Leasing Company's income as well as three times our own, the owner of the 90 per cent going scot free. We don't think counsel meant to say that either the Supreme Court of Utah or any other court had furnished authority for such a proceeding. We are referred to no such authority, nor has such a law elsewhere enacted come to our knowledge.

Under the old law a certain definite income was taxed. The statement by counsel that such income represented the value of the mine is wholly original with them. It could not and certainly did not in the mind of anyone stand for the value of the mine. Value for taxation is market value—fact, not fiction. The value of a mine is indicated by what remains in it, certainly not by what has been taken out of it. We note the following

from counsel's quotation from the Colorado case at page 32 of their brief;

> "The value, ultimately, of course, depends upon the net proceeds derived from the ore, but this cannot be known until the ore has been extracted, after which the mine, as such, has no value."

The perfectly obvious fact that a mine cannot be valued by what has been taken away from it has been judicially recognized. See 26 R. C. L., page 368, section 324, as follows:

> "In the case of mining property income is no test of value, because each year's income represents to that extent a depletion of capital and a diminution in the actual intrinsic value of the property."

Also see:

State v. Cook, 60 N. J. L. 70, 36 Atl. 892.

A concrete example to prove the truth of this assertion, if desired, will be found in the facts of this case now before this court.

Mines are not bought and sold at prices responsive to values no longer there. Market value is not influenced by the unknown. A mine without apparent ore deposits would command a very small price on the market however much might have been taken out in the past. True, such a mine might have more or less of a speculative value making it attractive for lease and option involving no present payment, but no purchase would be made nor would a market value exist until sufficient ore had been developed to reasonably insure a return of the price paid. The mine would then have a market value resulting from what it was then known to contain. Why the state may not employ a competent engineer to advise

upon the market value of its mines is not at all apparent to us. Market value does not presuppose more than general recognition of the usual elements thereof then known to be possessed by the property under examination. There would be a reasonably accurate appraisal, an examination made and an honest judgment passed, not a meaningless multiplication of wholly irrelevant factors.

The law as amended and effective January 1, 1919, has never been interpreted by the Supreme Court of Utah or by any court other than the court below in this case. We evidently failed to make clear to the trial judge that the Utah decisions cited by counsel bearing upon the old law, a tax upon net proceeds or income only, were not applicable to the present law, a property tax, whereby the mine was taxed and the net proceeds or income exempt. The trial court's suggestion in its opinion (Tr. 20) that we should have provided by contract with the Utah Leasing Company for an apportionment of the taxes between us indicates such confusion. That contract was made in January of 1914 when the net proceds or income were taxed to their owner or owners in their several interests and it was a good deal to expect that we could then look five years hence and visualize the original and peculiar constitutional and statutory creation to which we are now subjected.

For every mine there is a dump and the situation presented by this case will hereafter be repeated in all the absurdities suggested in plaintiff's brief, a result necessarily following the application of this law as interpreted by the state authorities and without the slightest

pretense toward the requisite equality between the members of the class. As a constitution or statute violates the 14th amendment according to what *may* be rather than what *has been* done under it, these results are suggested to illustrate how far the present Utah laws have been carried beyond the oft repeated justification for inequality resulting from errors in judgment in appraisal, that obsolute equality in taxation is impossible of attainment. Counsel ignore our illustrations, except as to a dump deposited in Utah from a Nevada mine, as to which it is said at page 38 of defendant's brief:

> "If the products of mines of the other states are shipped into Utah then those products form another or different specie of property, and of course would be taxed under the provisions of laws not here involved."

So a dump from a mine outside the state is neither a mine nor part of a mine, nor taxable as such—instead it is taxable at its full value as we here contend all dumps should be taxed, as valuable mineral deposits or other property merely. Counsel contend for a classification of dumps as metalliferous mines or just plain property depending upon the location of the mines from which they came—that the state line was in the wrong place for our protection. The thing sought to be determined is the value of the dump. The geographical location of the mine certainly bears no relation to that accomplishment.

Before leaving this subject, reference should be made to defendant's comment beyond the record at page 2 of its brief as follows:

> "Similar statements were furnished by the plain-

tiff mining company during the early part of 1919, showing the net annual proceeds derived from the said mine for the year 1918 to be $120,547.00 (being the net proceeds derived from said tailings.)"

It is a fact that plaintiff, at the state's request, filed a return with the State Board of Equalization early in 1919 of its net proceeds for the year 1918 resulting from Utah Leasing Company's operations of the dump. Plaintiff's return, however, was only of its royalty. Plaintiff did not return as its net proceeds the sum of $120,547.00, as stated by counsel. The State Board of Equalization arrived at that sum over plaintiff's protest. The ownership of those net proceeds was a thing of no interest to the taxing authorities. Instead those net proceeds merely supplied the base required by this fiction for multiplication by three to arrive at the so-called value of the mine, wholly without regard to such ownership.

Whether or not Utah Leasing Company agreement effected a sale of the dump.

We are aware of those decisions refusing to construe such agreements technical sales as applied to realty. We are also aware of the decisions of this court refusing to treat royalty paid to lessors received from the mining operations of their lessees as a mere conversion of capital within the national income tax laws. But we believe it has been consistently held that such agreements, having for their purpose the very consumption of the thing involved, create a separable interest for purposes of taxation. Reference is suggested to Shaw v. Watson (Louisiana), 92 So. 375, where it was held:

"The fundamental rule to be observed is that a

> person should not be assessed for taxes on property that does not belong to him. In violation of that rule, the assessment attempted in this case was ten times the value of the tax debtor's holdings. Such a method of assessment would lead to confiscation; for there is no more reason for saying that a landowner who owns only a fractional part of the mineral rights in his land should pay taxes on all of the mineral rights than there would be for saying that a landowner who owns no part of the mineral rights should pay taxes on them. The method of assessment complained of is therefore an abritrary discrimination against the class of landowners who have no interest in the minerals underlying their lands, and it would therefore deprive that class of property owners of the equal protection of the law."

The court citing Green v. Louisville & Interurban R. R. Co., 244 U. S. 499, 37 Sup. Ct. 673, 61 L. Ed. 1280, Ann. Cas. 1917 E, 88.

Property in Utah is, of course, taxable to its owner. Sections 5883, 5884, Compiled Laws of Utah, 1917; also Section 3, Aritcle XIII, Constitution of Utah.

The tax in this instance was assessed wholly against plaintiff in error because the latter was the owner of the mine, in which Utah Leasing Company had no interest. It was not then contended the dump was a part of the mine. The taxing authorities were not then interested in the ownership of the dump for the dump was not being assessed. The distinction between dump and mine was clearly enough drawn in this assessment. The defendant's present confusion of the two results from the necessity of establishing the dump as a metalliferous mine to justify application of the multiple of three, but therein

the fact that plaintiff's interest is only by way of a ten per cent royalty is ignored.

Respectfully submitted,

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